23948

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 378.

MORTIMER WEBSTER, PLAINTIFF IN ERROR,

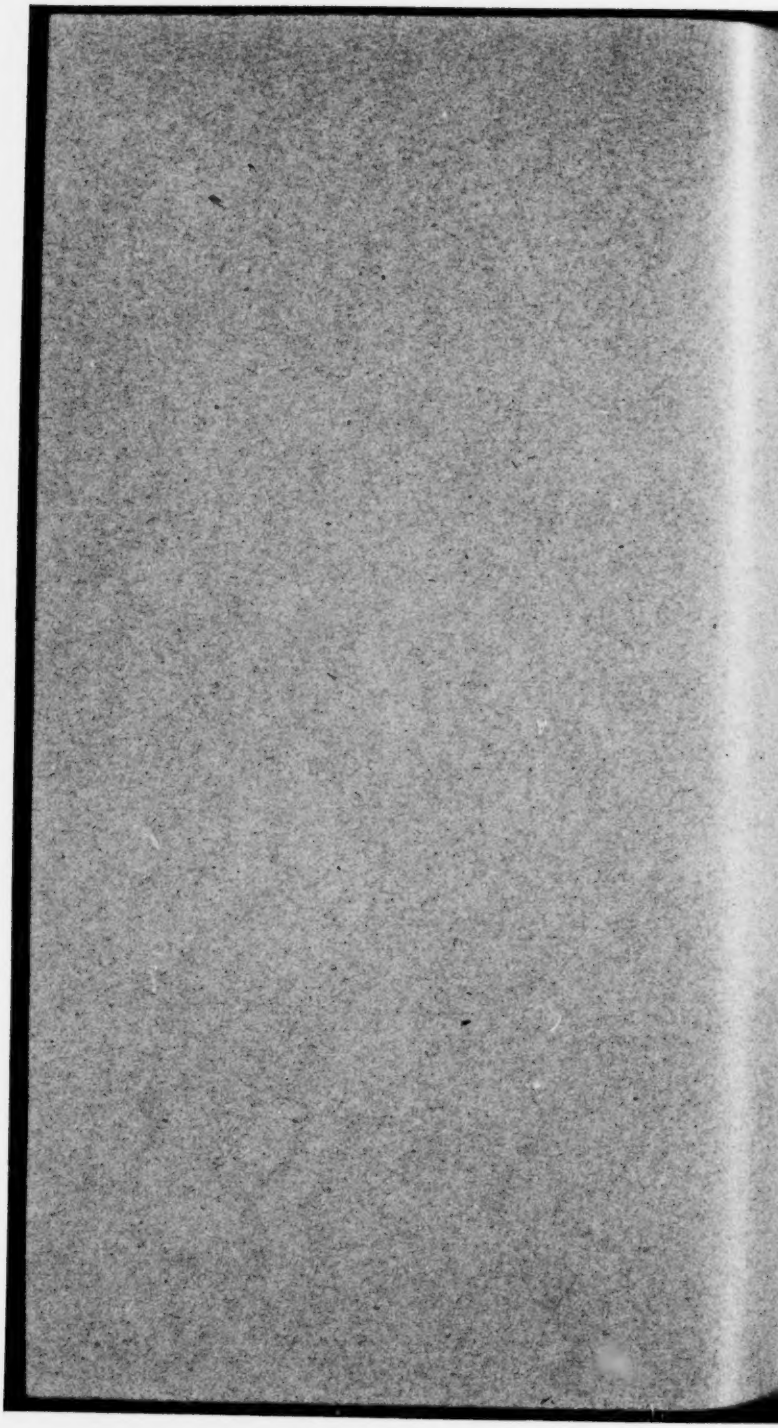
vs.

THE CITY OF FARGO; JAMES M. ROWE, AS AUDITOR OF THE CITY OF FARGO; D. C. ROSS, AS COUNTY TREASURER OF CASS COUNTY, AND O. J. OLSON, AS COUNTY AUDITOR OF CASS COUNTY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

FILED AUGUST 6, 1900.

(17,863.)



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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 16, 1900.

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a The President of the United States to the honorable the judges of the supreme court of the State of North Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of North Dakota, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit, between the said Mortimer Webster, plaintiff and plaintiff in error, and the said The City of Fargo, James M. Rowe, as auditor of the city of Fargo; D. C. Ross, as county treasurer of Cass county, and O. J. Olson, as county auditor of Cass county, defendants and defendants in error, wherein was drawn in question the validity of a statute of said State and of an authority exercised thereunder, on the ground of being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of the said Mortimer Webster, plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington within sixty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and
b according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 16th day of May, 1900.

[Seal Circuit Court of the United States, District of North Dakota.]

J. A. MONTGOMERY,
Clerk of the Circuit Court of the United States in and for the District of North Dakota, in the Eighth Circuit.

Allowed by—
Hon. J. M. BARTHOLOMEW,
Chief Justice of the Supreme Court of the State of North Dakota.

c UNITED STATES OF AMERICA, *ss:*

The President of the United States to The City of Fargo, James M. Rowe, as auditor of the city of Fargo; D. C. Ross, as county treasurer of Cass county, and O. J. Olson, as county auditor of Cass county, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, at Washington, within sixty

days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of North Dakota, wherein Mortimer Webster is plaintiff in error and you and each of you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 17 day of May, 1900, and of the Independence of the United States the one hundred and twenty-fourth.

J. M. BARTHOLOMEW,
Chief Justice of the Supreme Court of the State of North Dakota.

Attest: R. D. HOSKINS, *Clerk.*

[Seal Supreme Court, State of North Dakota.]

I, C. J. Mahnken, attorney of record in the supreme court of the State of North Dakota for the defendants and respondents, The City of Fargo, James M. Rowe, as auditor of the city of Fargo; D. C. Ross, as county treasurer of Cass county, and O. J. Olson, as county auditor of Cass county, in the action mention- in the foregoing citation, hereby admit due and personal service of said citation, at the city of Fargo, in the State of North Dakota, this 18th day of May, 1900.

CHARLES J. MAHNKEN,
Attorney for said Defendants & Respondents.

d [Endorsed:] Original. United States Supreme Court. Mortimer Webster, plaintiff in error, against The City of Fargo *et al.*, defendants in error. Seth Newman, attorney for plaintiff in error, Fargo, N. D. 763. Filed in the clerk's office, supreme court, State of North Dakota, May 21, 1900. R. D. Hoskins, clerk.

e STATE OF NORTH DAKOTA, } ss:
In the Supreme Court, }

R. D. Hoskins, being first duly sworn, on oath says that he is the clerk of the supreme court of the State of North Dakota; that owing to other official duties he has been unable to complete the transcript on appeal to the Supreme Court of the United States of America in the case of Mortimer Webster, plaintiff in error, *vs.* The City of Fargo *et al.*, defendants in error, within the time allowed by the following writ of error; that he will be unable to file said transcript with the clerk of the Supreme Court of the United States, at Washington, before August 1st, 1900; that he asks an order extending the time for filing such transcript up to and including August 1st, 1900.

R. D. HOSKINS.

Subscribed and sworn to before me this 25th day of July, 1900.

J. M. BARTHOLOMEW,
Chief Justice of the Supreme Court of North Dakota.

On reading and filing the above affidavit of R. D. Hoskins, and it appearing to the undersigned that good cause exists for extending the time for filing the said transcript, now, therefore,

It is ordered that the time for filing the said transcript be, and the same is, extended to August 1st, 1900.

Given under my hand, at Bismarck, North Dakota, this 25th day of July, A. D. 1900.

J. M. BARTHOLOMEW,
Chief Justice of the Supreme Court of the State of North Dakota.

1 UNITED STATES OF AMERICA:

In the Supreme Court.

STATE OF NORTH DAKOTA, } ss:
In the Supreme Court, }

MORTIMER WEBSTER, Plaintiff in Error,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor of the City of Fargo; D. C. Ross, as County Treasurer of Cass County, and O. J. Olson, as County Auditor of Cass County, Defendants in Error.

I, R. D. Hoskins, clerk of the supreme court of the State of North Dakota, in pursuance of the mandate contained in the foregoing attached writ of error, do hereby certify and return that on the 8th day of Feb., 1900, there was filed in my said office the judgment-roll on appeal from the district court of the county of Cass, in the State of North Dakota; which said judgment-roll is in words and figures as follows, to wit:

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

In District Court, Third Judicial District.

MORTIMER WEBSTER, Plaintiff,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor of the City of Fargo; D. C. Ross, as County Treasurer of Cass County, and O. J. Olson, as County Auditor of Cass County, Defendants.

Summons.

The State of North Dakota to the above-named defendants:

You are hereby summoned to answer the complaint in this action, which will be filed in the office of the clerk of the district court of the third judicial district in and for the county of Cass and State of North Dakota, and to serve a copy of your answer upon the sub-

scribers within thirty days after the service of this summons
2 upon you, exclusive of the day of service, and in case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Dated this 30th day of December, A. D. 1899.

NEWMAN, SPALDING & STAMBAUGH,
Attorneys for Plaintiff, Rooms 1, 2, 3, and 4, First Nat'l Bank Bldg., Fargo, North Dakota.

STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

MORTIMER WEBSTER, Plaintiff,
vs.
THE CITY OF FARGO ET AL., Defendants.

Affidavit of Service of Summons.

STATE OF NORTH DAKOTA, }
County of Cass, } ss:

Otto Aurland, being first duly sworn, says that he is over twenty-one years and resides in the city of Fargo, in said county and State; that on the second day of January, 1900, he served the annexed summons in the above-entitled action on the defendants D. C. Ross, as county treasurer of Cass county, and O. J. Olson, as county auditor of Cass county, by delivering to each of said defendants a true and correct copy of said summons, at said city of Fargo, in said county of Cass and State of North Dakota.

OTTO AURLAND.

Subscribed and sworn to before me this 31st day of January, 1900.

[SEAL.] W. S. STAMBAUGH,
Notary Public, Cass County, North Dakota.

3 STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

MORTIMER WEBSTER, Plaintiff,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor of the City of Fargo; D. C. Ross, as County Treasurer of Cass County, and O. J. Olson, as County Auditor of Cass County, Defendants.

Complaint.

Plaintiff, for his complaint herein, alleges:

I.

That the defendant James M. Rowe is the duly elected, qualified, and acting city auditor of said city of Fargo.

II.

That the said defendant, D. C. Ross, is the duly elected, qualified, and acting county treasurer of said county of Cass.

III.

That the said defendant, O. J. Olson, is the duly elected, qualified, and acting county auditor of said county of Cass.

IV.

That this plaintiff is and during all the times hereinafter mentioned was the owner in fee of lot twelve (12), in block one (1), of Keeney & Devitt's addition to said city of Fargo, in said county of Cass and State of North Dakota, which said lot abuts and abounds upon Northern Pacific avenue, which is a street in said city, and also upon Fifth street north, which is a street in said city intersecting said Northern Pacific avenue, and has a frontage upon said Northern Pacific avenue for a distance of twenty-five (25) feet and upon said Fifth street north for a distance of one hundred forty (140) feet.

V.

That on or about the 4th day of March, 1896, the city council of said city of Fargo passed a resolution by which said
4 council declared it necessary to grade, pave, and curb said Fifth street north from said Northern Pacific avenue to First avenue north, a street in said city, and from the east line of Broadway, a street in said city, to the east line of said First avenue north, and in and by said resolution directed said city auditor of the city of Fargo to publish said resolution four consecutive weeks in the official newspaper of said city, and the said city auditor, pursuant to said resolution and law in such case made and provided, caused said resolution to be published in the Fargo Forum and Daily Republican, which is a newspaper of general circulation printed and published in said city of Fargo and which was at said time the official newspaper of said city, on the 7th, 14th, 21st, and 28th days of May, 1896, and due proof of such publication in said newspaper was filed in the office of said city auditor on the 1st day of June, 1896.

VI.

That thereafter, and on or about the 22nd day of June, 1896, the city council of said city of Fargo passed a resolution, by which resolution said city council directed that said Fifth street north be graded, paved, and curbed from said Northern Pacific avenue to said First avenue north, with that part of said First avenue north hereinbefore described, and that a contract be made therefor, and that an assessment for the cost thereof be made, and that said city auditor advertise for bids for said grading, paving, and curbing of said Fifth street north, as aforesaid.

VII.

That pursuant to such resolution the said city auditor prepared a notice that bids for the paving of said Fifth street and First avenue north would be received until seven o'clock p. m. July 6, 1896, and the said city auditor caused the said notice for bids for such paving to be published in the said Fargo Forum and Daily Republican on the 24th, 25th, 26th, 27th, 29th, and 30th days of June and on the 1st, 2nd, 3rd, 4th, and 6th days of July, 1896, and due proof of such publication was filed in the office of said city auditor on the
5 6th day of July, 1896.

VIII.

That among other bids received and filed in said city auditor's office pursuant to said resolution and said advertisement for the grading, paving, and curbing of said Fifth street and said First avenue north was the bid of one Henry O'Neill, filed in said office on or about said 24th day of July, 1896, and before the expiration of the time fixed for receiving bids for such grading, paving, and curbing, which said bid was accompanied by the necessary bond and check, as specified in said notice.

IX.

That upon the opening of the bids received for grading, paving, and curbing said Fifth street and said First avenue north in pursuance to said resolution and said advertisement at a meeting of said city council held at seven o'clock p. m. on said 6th day of July, 1896, the bid of the said Henry O'Neill was declared to be the lowest bid received by said city council and was by said city council accepted, and thereafter, and on or about the 21st day of July, 1896, the said city of Fargo, pursuant to said bid of said Henry O'Neill and the resolution of said council accepting same, entered into a written contract with said Henry O'Neill for the grading, paving, and curbing of said Fifth street north from the said Northern Pacific avenue to said First avenue north, as aforesaid.

X.

That thereupon the city engineer of said city of Fargo proceeded to calculate the amount to be assessed for such improvement upon each lot or parcel of ground abutting or abounding upon the same, including the said lot belonging to this plaintiff; and in estimating such assessment he took the entire cost of such improvement and divided the same by the number of feet fronting or abutting upon said improvement, and the quotient was the sum to be assessed per front foot upon each lot or parcel of land abutting or abounding
6 upon said improvement, including said lot owned by this plaintiff; that said city engineer fully completed his said estimate and entered thereupon as his estimate of assessment against the said lot owned by this plaintiff the sum of four hundred sixty-one $\frac{81}{100}$ dollars, and returned his said estimate of assessment, including the

assessment upon said lot of this plaintiff, to said city council on the 14th day of September, 1896; and upon said estimate of assessment being made and returned to said city council, as aforesaid, the said city auditor of said city caused the same to be published in said Fargo Forum and Daily Republican on the 16th, 17th, 18th, 19th, 21st, 22nd, 23rd, 24th, 25th, and 26th days of September, 1896, together with a notice that the city council of said city of Fargo would hold a meeting on the 28th day of September, 1896, at 7.30 o'clock p. m., to approve said assessment.

XI.

That at a meeting of said city council of the said city of Fargo held on said 28th day of September, 1896, at the time and place mentioned in said notice, the said estimate of assessment so made and returned by said city engineer, as aforesaid, was, by resolution of said city council, duly approved, and said city auditor was directed to make an assessment-roll therefrom, as required by law, and the said city auditor thereupon made an assessment-roll, describing the property so assessed, with the name of the owner and the amount assessed to each lot or parcel of land as approved by said city council, including the amount assessed against said lot belonging to this plaintiff, which was the sum of four hundred sixty-one and $\frac{81}{100}$ dollars, and attached thereto a copy of the resolution of said city council approving said estimate and his certificate that the same was correct, and thereupon filed said assessment-roll with the city treasurer of said city of Fargo for collection.

XII.

That said city treasurer thereupon forthwith published
7 said list three consecutive weeks, once in each week, in the said Fargo Forum and Daily Republican, together with a notice that said assessments would become delinquent if the same were not paid within thirty days after the first publication of said list, together with a notice that a penalty of ten per cent. (10 %) would be added thereto after same became delinquent.

XIII.

That thereafter and after the 9th day of March, 1897, the said assessment-roll was duly filed with the county treasurer of said county of Cass for collection, together with a penalty upon the amount of said assessment of forty-six and $\frac{28}{100}$ dollars ($46.28), which was added to the said assessment by the said city treasurer at the time mentioned in his notice, hereinbefore mentioned.

XIV.

That thereafter, said special assessment being delinquent, said county treasurer of said Cass county delivered said assessment-roll containing such special assessment upon the lot of this plaintiff to the county auditor of said county of Cass, and said county auditor thereupon extended the same upon the tax-roll of said Cass county.

XV.

That the said county auditor of said county of Cass, the defendant herein, threatens to and will, unless restrained by the order and judgment of this court, advertise said lot twelve (12), in said block one (1), of said Keeney & Devitt's addition to said city of Fargo for sale for said delinquent assessment, and threatens to and will offer same for sale and sell the same for such delinquent assessment.

XVI.

That each and every of the acts and proceedings required to be done and taken by the statutes of said State of North Dakota in making and return of said assessment, as aforesaid, were duly taken and done, and said assessment is void and of no force, for the
8 reason that said statutes are in violation of the 14th amendment of the Constitution of the United States.

XVII.

That said assessment, together with the said penalty thereon, is an apparent lien upon said lot twelve (12) so, as aforesaid, owned by this plaintiff, and creates a cloud upon the title of this plaintiff to said premises.

Wherefore plaintiff prays the judgment of this court:

1st.

That the said defendant, O. J. Olson, as county auditor of said Cass county, be forever enjoined and restrained from selling or offering for sale for said delinquent assessment and penalty or either thereof the said premises hereinbefore described.

2nd.

That said assessment and penalty be declared null and void and a cloud upon the title of this plaintiff to said premises.

3rd.

That the said defendant, J. M. Rowe, as city auditor of said city of Fargo; D. C. Ross, as treasurer of said county of Cass, and O. J. Olson, as auditor of said county of Cass, be required to cancel said assessment wherever the same appears upon the books and records of their said offices by a proper entry made by said officers upon their said respective books and records, and for such other and further relief as to this court shall seem meet and proper, together with his costs and disbursements in this action.

NEWMAN, SPALDING & STAMBAUGH,
Attorneys for Plaintiff, Fargo, N. D.

STATE OF NORTH DAKOTA, }
County of Cass. } ss:

Seth Newman, being first duly sworn, on oath says that he is a member of the firm of Newman, Spalding & Stambaugh, attorneys

for the plaintiff in the within-entitled action; that he has
9 read the foregoing complaint and knows the contents thereof, and that the same is true to his best knowledge, information, and belief.

SETH NEWMAN.

Subscribed and sworn to before me this 31 day of Jan., 1900.
MAME V. MACKAY (NOW HUTTON),
[SEAL.] *Notary Public, Cass County, North Dakota.*

(Endorsements.)

Complaint.

Due and personal service of the within complaint, by copy, hereby admitted this 1 day of February, 1900, at Fargo, North Dakota.
MAHNKEN, *Attorney for Def't.*
NEWMAN, SPALDING & STAMBAUGH,
Attorneys for Plaintiff, Fargo, North Dakota.

STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

MORTIMER WEBSTER, Plaintiff,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor of the City of Fargo; D. C. Ross, as County Treasurer of Cass County, and O. J. Olson, as County Auditor of Cass County, Defendants.

The defendants demur to the complaint herein upon the ground that said complaint does not state facts sufficient to constitute a cause of action against the said defendants or either of them.

CHARLES J. MAHNKEN,
Attorney for Defendants, Fargo, N. Dak.

10 STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

MORTIMER WEBSTER, Plaintiff,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor of the City of Fargo; D. C. Ross, as County Treasurer of Cass County, and O. J. Olson, as County Auditor of Cass County, Defendants.

This cause coming on for hearing on the demurrer of the defendants to the complaint of the plaintiff herein, both parties appearing at this time, the plaintiff appearing by Newman, Spalding & Stambaugh, his attorneys, and raising the question that the statutes of the State of North Dakota, under which the special assessment set forth in the complaint was levied, and said assessment are in viola-

tion of the 14th amendment of the Constitution of the United States, the defendants appearing by C. J. Mahnken, their attorney, and both parties consenting that said demurrer be heard and submitted and the court having heard the same and duly considered the matter:

Now, on motion of C. J. Mahnken, attorneys for the defendants—

It is ordered that said demurrer be, and the same is hereby, sustained, and the plaintiff having announced in open court that he stood upon his demurrer and did not desire to amend his complaint herein—

It is hereby further ordered, on motion of said Mahnken, that the defendants have judgment herein dismissing the complaint of the plaintiff upon the merits, and the clerk is hereby directed to enter such judgment.

Feb'y 6th, 1900.

By the court:

CHAS. A. POLLOCK, *Judge.*

11 To the foregoing order and the whole thereof plaintiff excepts, and such exception is allowed.

Feb'y 6th, 1900.

By the court:

CHAS. A. POLLOCK, *Judge.*

At a term of the district court of the State of North Dakota, held in and for the county of Cass, in the third judicial district, at the court-house, in the city of Fargo, in said county and State, on the 6th day of February, 1900, being a day in the term of said court.

Present: Hon. C. A. Pollock, judge presiding.

MORTIMER WEBSTER, Plaintiff,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor of the City of Fargo; D. C. Ross, as County Treasurer of Cass County, and O. J. Olson, as County Auditor of Cass County, Defendants.

This cause coming on for hearing on the demurrer of the defendants to the complaint of the plaintiff herein, both parties appearing at this time, the plaintiff appearing by Newman, Spalding & Stambaugh, his attorneys, and raising the question that the statutes of the State of North Dakota, under which the special assessment set forth in the complaint was levied, and said assessment are in violation of the 14th amendment of the Constitution of the United States, the defendants appearing by C. J. Mahnken, their attorney, and both parties consenting that said demurrer be heard and submitted, and the court having heard the same and duly considered the matter, and the court having sustained the demurrer of the defendants and ordered that judgment herein dismissing the complaint of the plaintiff upon the merits, and for the costs and disbursements of the defendants, be entered by the clerk:

Now, on motion of C. J. Mahnken, attorney for defendants—
12 It is ordered, adjudged, and decreed that the complaint of the plaintiff herein be, and is hereby, dismissed upon the merits.

Witness the Honorable Charles A. Pollock, judge of the said court, at the court-house, in the city of Fargo, in said county of Cass and State of North Dakota, this 6th day of February, 1900.

[SEAL.]

Attest: E. M. PATTON, *Clerk*,
By W. A. BROWN, *D'p'y.*

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

I, E. M. Patton, clerk of the district court of the State of North Dakota in and for the county of Cass, hereby certify that the foregoing is a true and correct copy of a judgment this day entered by me in the judgment book in my office and of the whole thereof as the same now remains of record in my said office.

Witness my hand and the seal of said court this sixth day of February, A. D. 1900.

E. M. PATTON, *Clerk*,
[SEAL.] By W. A. BROWN, *Dep.*

Notice of entry of foregoing judgment is hereby admitted this — day of February, 1900.

NEWMAN, SPALDING & STAMBAUGH,
Attorneys for Plaintiff.

13 (Endorsement:) Filed in the office of clerk of district court, Cass Co., N. Dak., Feb. 6, 1900. E. M. Patton, clerk. W. A. Brown, deputy.

STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

MORTIMER WEBSTER, Plaintiff,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor of the City of Fargo; D. C. Ross, as County Treasurer of Cass County, and O. J. Olson, as County Auditor of Cass County, Defendants.

I, Charles A. Pollock, judge of the district court of the State of North Dakota in and for the third judicial district, hereby certify that the foregoing papers, to wit, summons, complaint, demurrer, order sustaining demurrer and for judgment, judgment, are contained in and constitute the judgment roll in the above-entitled action and the whole thereof.

By the court:

CHAS. A. POLLOCK, *Judge.*

STATE OF NORTH DAKOTA, } ss:
County of Cass, }

In District Court, Third Judicial District.

MORTIMER WEBSTER, Plaintiff,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor, ET AL., Defendants.

I, E. M. Patton, clerk of the district court within and for the said county of Cass, in the third judicial district of the State of North Dakota, do hereby certify that the above and foregoing
14 papers are the original notice of appeal, admission of service thereon, and waiver of undertaking, and also the original judgment-roll and certificate of the judge thereto appended, in the above-entitled action, wherein Mortimer Webster is plaintiff and The City of Fargo *et al.* are defendants, as the same now remains of record in said court, and the same are transmitted to the supreme court pursuant to said appeal.

In witness whereof I have hereunto set my hand and affixed the seal of said court this seventh day of Feb'y, A. D. 1900.

E. M. PATTON, *Clerk,*
[SEAL.] By W. A. BROWN, *Deputy.*

(Endorsements:) Certificate of judgment-roll. Filed in the office of clerk of district court, Cass Co., N. Dak., Feb. 7, 1900. E. M. Patton, clerk. W. A. Brown, deputy.

STATE OF NORTH DAKOTA, }
County of Cass. }

In District Court, Third Judicial District.

MORTIMER WEBSTER, Plaintiff,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor of the City of Fargo; D. C. Ross, as County Treasurer of Cass County, and O. J. Olson, as County Auditor of Cass County, Defendants.

Notice of Appeal.

To the above-named defendants and C. J. Mahnken, their attorney:

You will please take notice that the plaintiff in the above-entitled action appeals to the supreme court of the State of North Dakota from the judgment entered in said action on the sixth day of February, 1900, and from the whole thereof.

Dated February 6, 1900.

NEWMAN, SPALDING & STAMBAUGH,
Attorneys for Plaintiff, Fargo, N. D.

Due and personal service of the foregoing notice is hereby
15 admitted, at the city of Fargo, in said county and State, on this sixth day of February, 1900, and all undertakings on said appeal are hereby waived.

MAHNKEN,
Attorney for Defendants.

(Endorsements:) Notice of appeal. Filed in the office of clerk of district court, Cass Co., N. Dak., Feb. 7, 1900. E. M. Patton, clerk.

On March 27th, 1900, the said cause was argued before the court and by the court take under advisement.

On May 5th, 1900, the said court entered an order affirming the judgment of the district court in and for the county of Cass, North Dakota; which order is in words and figures as follows, to wit:

File No., 763.

STATE OF NORTH DAKOTA, *ss:*

In the Supreme Court.

MORTIMER WEBSTER, Plaintiff and Appellant,
vs.
THE CITY OF FARGO ET AL., Defendants and Respondents.

Appeal from the district court of Cass county.

This action coming on to be heard at the March, A. D. 1900, term of this court, at the supreme court room, in the city of Fargo, State of North Dakot—apresent, J. M. Bartholomew, chief justice; Alfred Wallin and N. C. Young, associate justices—and the appeal herein having been submitted for the appellant and for respondent-, and the court having advised thereon, it is now here considered, ordered, and adjudged that the judgment of the district court within and for said Cass county appealed from herein be, and the same is hereby, affirmed.

And it is further ordered that this cause be, and it is hereby,
16 remanded to the district court for further proceedings according to law and the judgment of this court.

And it is further considered and adjudged that respondents have and recover of the appellant costs and disbursements on this appeal expended, to be taxed and allowed in the district court.

Dated May 5th, 1900.

By the court:

J. M. BARTHOLOMEW,
Chief Justice.

[SEAL.]

Attest: R. D. HOSKINS, *Clerk.*

On May 5th, 1900, the said court filed an opinion; which opinion is in words and figures as follows, to wit:

In the Supreme Court, State of North Dakota, March Term, 1900.

MORTIMER WEBSTER, Appellant,
vs.
THE CITY OF FARGO ET AL., Respondents.

A legislative enactment which charges the entire cost of paving the streets of a city against the property abutting the paving and in proportion to frontage is not in contravention to the fourteenth amendment to the Federal Constitution.

In exercising the power of local assessment the legislature is not limited to the actual increase in value of the property assessed resulting from the local improvement (Rolph *vs.* City of Fargo, 7 N. D., 640, followed).

(Syllabus by the court.)

17 Appeal from the district court of Cass county, Hon. Chas. A. Pollock, judge.

Newman, Spalding & Stambaugh, for appellant.

C. J. Mahnken and J. E. Greene, for respondents.

BARTHOLOMEW, *C. J.:*

This action was brought to cancel and annul a special assessment for paving purposes in the city of Fargo. The assessment was levied in 1896, pursuant to the statutes then in force, being article 17 of chapter 28, Political Code of 1895. The complaint affirmatively sets forth the due compliance with all the statutory requirements in making the assessment and seeks to avoid the assessment upon the sole ground that the statute under which it was made contravenes the fourteenth amendment to the Federal Constitution, in that it deprives the owner of the premises of his property without due process of law and of the equal protection of the laws and without an opportunity to be heard as to the justice of the amount demanded. A demurrer to the complaint was sustained. This assessment was made under section 2280, Revised Codes of 1895, which reads: "Whenever any work or improvement mentioned in the preceding section shall have been determined upon and the contract let therefor, the city engineer shall forthwith calculate the amount to be assessed for such improvement for each lot or parcel of ground abutting or bounding upon such improvement. And in estimating the assessment he shall take the entire cost of such improvement and divide the same by the number of feet fronting or abutting upon the same, and the quotient shall be the sum to be assessed per front foot so bounding or abutting, and said estimate shall be filed with the city auditor and shall be presented to the city council for its approval at the first meeting held thereafter. The city auditor shall cause said estimate of the city engineer, together with a notice of the time and place when the council will meet to approve of the same, to be published in the official newspaper of the city for at least ten days prior to

the meeting of the city council to approve the same." A
18 similar assessment under this same section, and resting in all respects upon the same basis, was before this court in Rolph *vs.* City of Fargo, 7 N. D., 640. That assessment was resisted upon substantially the same grounds that are urged here. As the question was then new in this jurisdiction, and was of much importance, and as this court conceived the adjudications upon the point to be conflicting and somewhat uncertain, a very elaborate opinion was prepared by Chief Justice Corliss, in which the underlying principles were discussed at length, and the leading cases upon all phases of the question were cited. After the fullest consideration we upheld the assessment. We are now asked, however, to reverse the holding for the reason that the Federal Supreme Court, in the case of Village of Norwood *vs.* Baker, 172 U. S., 269, decided since our decision in the Rolph case, have established the broad principle that all special assessments upon the basis of frontage are in violation of the fourteenth amendment to the Federal Constitution, in that they may result in the taking of property without due process of law. That appellant's view of that case has support in the case is shown by the fact that the decision has been thus construed in Fay *vs.* City of Springfield, 94 Fed. Rep., 409, and Cowley *vs.* City of Spokane, 99 Fed. Rep., 840. After a careful study of the opinion in Norwood *vs.* Baker, we are not convinced that the court intended to enunciate the broad proposition for which appellant contends. Rather we think that case depended entirely upon the particular statutes of the State of Ohio there considered, and that such statutes as construed by that court authorized a special assessment on the front-foot plan without and legislative determination, express or implied, that such property had been specially benefitted to the extent of the special assessment, or at all. As we read the opinion the assessment was not held void because it was levied on the front-foot plan—a special assessment by valuation would have been equally void and for the same reason—because corresponding special benefit had been in no way ascer-
19 tained or declared. We do not think the court intended to negative the proposition that a legislature has power to fix the taxing district that should be specially benefitted by a designated improvement and place the entire cost of such improvement upon such taxing district. We think that court has repeatedly held the affirmative of that proposition. In Spencer *vs.* Merchant, 125 U. S., 763, that court said: "The legislature, in the exercise of its power of taxation, has the right to direct the whole or a part of the expense of a public improvement, such as the laying out, grading, and repairing of a street, to be assessed upon the owners of lands benefitted thereby; and the determination of the territorial districts which should be taxed for a local improvement is within the province of legislative discretion." In Williams *vs.* Eggleston, 170 U. S., 304, the court said: "Neither can it be doubted that, if the State constitution does not prohibit, the legislature, speaking generally, may create a new taxing district, determine what territory shall belong to such district and what property shall be con-

sidered as benefitted by a proposed improvement." In Mobile County *vs.* Kimball, 102 U. S., 691, the court said at page 703: "Here the objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole State. Assuming this to be so, it is not an objection which destroys its validity. When any public work is authorized, it rests with the legislature, unless restrained by constitutional provisions, to determine in what manner the means to defray its costs shall be raised. It may apportion the burden ratably among all the counties or other particular subdivisions of the State, or lay the greater share or the whole upon that county or portion of the State specially and immediately benefitted by the expenditure." In Bauman *vs.* Ross, 167 U. S., 548, the court said at page 589: "But it is for the legislature, and not for the judiciary, to determine whether the expense of a public improvement should be borne by the whole State or
20 by the district or neighborhood immediately benefitted;" and again: "The legislature in the exercise of the right of taxation has the authority to direct the whole or such part as it may prescribe of the expense of a public improvement, such as the establishing, the widening, the grading, or the repair of a street to be assessed upon the owners of lands benefitted thereby;" and again: "The class of lands to be assessed for the purpose may be either determined by the legislature itself by defining a territorial district or by other designation, or it may be left by the legislature to the determination of commissioners, and be made to consist of such lands and such only as the commissioners shall decide to be benefitted;" and still further: "The rule of apportionment among the parcels of land benefitted also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated by commissioners." In Parsons *vs.* District of Columbia, 170 U. S., 45, the court sustained a specific assessment per front foot upon property abutting upon a street improvement, and quoted with approval from section 752, Dillon on Municipal Corporations (4th ed.), as follows: "Whether the expense of making such improvements shall be paid out of the general treasury or be assessed upon the abutting property or other property specially benefitted, and, if in the latter mode, whether the assessment shall be upon all property found to be benefitted or alone upon the abutters, according to frontage or according to the area of their lots, is, according to the present weight of authority, considered to be a question of legislative expediency;" and see also Irrigation District *vs.* Bradley, 164 U. S., 112; Davidson *vs.* New Orleans, 96 U. S., 97; Wolston *vs.* Nevin, 128 U. S., 578; Shoemaker *vs.* United States, 147 U. S., 282; Paulson *vs.* Portland, 149 U. S., 30; Willars *vs.* Presbury, 81 U. S., 676. In all these cases, as we understand
21 them, the power of the legislature to create special taxing districts, and to charge the cost of a local improvement, in whole or in part, upon the property in said district, either according to valuation or superficial area or frontage, has been recognized

and declared. We do not believe it was the intention of the Federal Supreme Court in Norwood *vs.* Baker to depart from this line of decisions. It is true that in many of these cases the court speaks of these special assessments as being dependent upon special benefits, and to be made according to benefits received. We endeavored in the Rolph case to show that all taxation was, in theory, based upon benefits conferred, and that, in theory, those benefits must always equal or exceed the burden imposed. Upon no other ground can taxation be ethically defended. It matters not whether the taxation be for the general support of the government that protects person and property, or for the maintenance of the schools that furnish education, or for the construction of buildings in which the public may transact business—alike in each case the theory is benefits conferred commensurate with the burdens imposed. This legislative power of general taxation for public purposes is so universally conceded that no tax-payer ever raises the question of benefits. Indeed, he cannot raise it, because the legislative authorization of the tax is a legislative determination that the tax is for the benefit of the public, and the right of the legislature to make that determination is exclusive, and, it being once established that the tax is for the benefit of the public, no individual member of that public can be heard to say that he is not benefitted, or that he is not benefited as largely as any other individual having the same amount of taxable property. Of course, this power of the legislature, while plenary within the limits of the constitution, yet is not an arbitrary power. The taxation must be for a public purpose. An attempt to lay a general tax for a private purpose would be confiscation and a court would at once defeat it. But a proper State tax is con-

22 clusively presumed to be for the benefit of every tax-payer in the State; a proper county tax is conclusively presumed to be for the benefit of every tax-payer in the county, and so for cities, townships, and school districts. In each instance the tax is presumed to be for the benefit of every tax-payer in the taxing district. Yet experience teaches us every day that this is only a theory. It is not a fact and never can be; but it must be adhered to as a theory and accepted as a fact or taxation must cease. The legislature may make a mistake. It may authorize a tax for a public purpose that ultimately fails to prove a public benefit in fact; but that does not affect the legislative power.

These general principles apply to and control special taxation and special assessments. The fact that the legislature has by law fixed certain permanent taxing districts does not deprive it of the power to fix other and special taxing districts, when by legislative determination such district is to receive a special benefit. It may not tax one district for the benefit of another any more than it might tax one county for the benefit of another, or authorize a general tax for a private purpose. But if the purpose be one that ostensibly and reasonably confers a special benefit upon a special locality, then the legislative power is plenary within the limits of the organic law. As said by Mr. Justice Brewer in his dissenting opinion in Norwood *vs.* Baker: "The legislative act charging the entire cost of an im-

provement upon certain described property is a legislative determination that the property described constitutes the area benefited, and also that it is benefited to the extent of such cost." And this legislative determination having been reached and the legislature having the exclusive power to make the determination, it cannot be questioned; and the fact of special benefit to the special district being thus established no tax-payer in that district can be heard to say that he is not benefited or that he is not benefited as
23 largely as any other tax-payer in the special taxing district having the same valuation, area, or frontage, as the case may be. No reason can be assigned why the tax-payer in the special district should have any more right to raise that question than the tax-payer in the permanent district. It never can be correct to say that special assessments must be measured by special benefits and can never exceed them. That is true in theory, but only in theory. In practice it cannot be enforced. The moment we concede that any one tax-payer has the right to the judgment upon the question of his benefits of any tribunal, except the legislature or the body authorized by the legislature to decide the matter, that moment we defeat the power of the legislature to make or authorize special assessments.

We adhere to our holding in Rolph *vs.* City of Fargo, and the judgment in this case is affirmed.

All concur.

J. M. BARTHOLOMEW.
ALFRED WALLIN.
N. C. YOUNG.

On the 17th day of May, 1900, a petition for writ of error was filed in said court and is in words and figures as follows, to wit:

In Supreme Court, State of North Dakota.

MORTIMER WEBSTER, Plaintiff and Appellant,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor of the City of Fargo; D. C. Ross, as County Treasurer of Cass County, and O. J. Olson, as County Auditor of Cass County, Defendants and Respondents.

Petition for Writ of Error.

To the Honorable J. M. Bartholomew, chief justice of the supreme court of the State of North Dakota:

The above-named plaintiff and appellant, feeling himself
24 aggrieved by the judgment of said supreme court of the State of North Dakota in the above-entitled cause, entered on the 5th day of May, 1900, complains that in the record and proceedings had in said cause, and also in the rendition of the judgment therein in the said supreme court at the March term thereof, A. D. 1900, against said plaintiff and appellant, on the said 5th day of May, 1900, manifest error hath happened, to the great damage of said plaintiff and appellant.

Wherefore said plaintiff prays for the allowance of a writ of error to the Supreme Court of the United States from said judgment, and for an order fixing the amount of bond for a supersedeas in said cause, and for such other orders and process as may cause the same to be corrected by the said Supreme Court of the United States.

Dated this ninth day of May, 1900.

NEWMAN, SPALDING & STAMBAUGH,
Attorneys for Plaintiff and Appellant.

On the 17th day of May, 1900, an order allowing writ of error was filed in said court and is in words and figures as follows, to wit:

At a term, to wit, the March term, 1900, of the supreme court of the State of North Dakota, held at the court-room, in the capitol, in the city of Bismarck, on the 12th day of May, A. D. 1900.

Present: The Honorable J. M. Bartholomew, chief justice.

MORTIMER WEBSTER, Plaintiff and Appellant,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor of the City of Fargo; D. C. Ross, as County Treasurer of Cass County, and O. J. Olson, as County Auditor of Cass County, Defendants and Respondents.

Order Allowing Writ of Error.

Upon motion of Newman, Spalding & Stambaugh, attor-
25 neys for the plaintiff and appellant, and upon filing a petition for a writ of error and an assignment of errors—

It is ordered that a writ of error be, and the same is hereby, allowed, to have reviewed in the Supreme Court of the United States the judgment heretofore entered herein, and that the amount of bond on said writ of error be, and the same is hereby, fixed at five hundred dollars.

J. M. BARTHOLOMEW,
Chief Justice of the Supreme Court of the State of North Dakota.

On the 17th day of May, 1900, an assignment of errors was filed in said court, and is in words and figures as follows, to wit:

In the Supreme Court of the United States, —— Term, 1900.

MORTIMER WEBSTER, Plaintiff in Error,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor of the City of Fargo; D. C. Ross, as County Treasurer of Cass County, and O. J. Olson, as County Auditor of Cass County, Defendants in Error.

Assignment of Errors.

Afterward, to wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, in the city of Washington, comes the said Mortimer Webster, plain-

tiff in error, by Seth Newman, his attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

That the complaint in said action and the matters therein contained are sufficient in law for the said Mortimer Webster to have or maintain his action aforesaid against the said The City of
26 Fargo, James M. Rowe, as auditor of the city of Fargo; D. C. Ross, as county treasurer of Cass county, and O. J. Olson, as county auditor of Cass county, defendants in error, because the acts and proceedings set forth in his said complaint as constituting a special assessment against his property, as therein set forth, and the statutes of the State of North Dakota under which said acts and proceedings were had and taken are in violation of the fourteenth amendment of the Constitution of the United States; and said special assessment constitutes a cloud upon the title of the property of the said Mortimer Webster, and the threatened sale thereof would create irreparable injury to him.

There is also error in this, to wit, that by the record aforesaid it appears that the judgment aforesaid given was given for the said The City of Fargo, James M. Rowe, as auditor of the city of Fargo; D. C. Ross, as county treasurer of Cass county, and O. J. Olson, as county auditor of Cass county, defendants in error, against the said Mortimer Webster, whereas by the law of the land the said judgment ought to have been given for the said Mortimer Webster against the said The City of Fargo, James M. Rowe, as auditor of the city of Fargo; D. C. Ross, as county treasurer of Cass county, and O. J. Olson, as county auditor of Cass county, and the said Mortimer Webster prays the judgment aforesaid may be reversed, annulled, and held for nothing, and that he may be restored to all things which he has lost by occasion of the said judgment.

Dated this 15th day of May, 1900.

SETH NEWMAN,
Counsel for Plaintiff in Error.

On the 17th day of May, 1900, a bond was filed in said court, and said bond is in words and figures as follows, to wit:

27 Supreme Court of the United States.

MORTIMER WEBSTER, Plaintiff in Error,
vs.
THE CITY OF FARGO, JAMES M. ROWE, as Auditor of the City of Fargo; D. C. Ross, as County Treasurer of Cass County, and O. J. Olson, as County Auditor of Cass County, Defendants in Error.

Know all men by these presents that we, Mortimer Webster, of the city of Fargo and State of North Dakota, plaintiff in error and principal, and the Fidelity and Deposit Company of Maryland, a corporation, duly authorized by law to become surety herein, are held and firmly bound unto the City of Fargo, James M. Rowe, as auditor of the city of Fargo; D. C. Ross, as county treasurer of Cass

county, and O. J. Olson, as county auditor of Cass county, defendants in error, in the sum of five hundred dollars ($500), to be paid to the said City of Fargo, James M. Rowe, as auditor of the city of Fargo; D. C. Ross, as county treasurer of Cass county, and O. J. Olson, as county auditor of Cass county, their successors, executors, or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and the said Mortimer Webster binds his heirs, executors, and administrators firmly with these presents.

Sealed with our seals. Dated this 16th day of May, 1900.

Whereas the above-named Mortimer Webster hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the supreme court of the State of North Dakota:

Now, therefore, the condition of this obligation is such that if the above-named Mortimer Webster shall prosecute his said writ
28 of error to effect and answer all costs and judgments, if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

MORTIMER WEBSTER,
By NEWMAN, SPALDING & STAMBAUGH, *His Attorneys.*
THE FIDELITY & DEPOSIT CO. OF MARYLAND,
[COMPANY SEAL.] By W. C. RESSER, *Its Att'y-in-fact.*

[Three cents U. S. internal-revenue stamps canceled.]

I hereby approve of the foregoing security and of the surety therein.

J. M. BARTHOLOMEW,
Chief Justice of the Supreme Court of the State of North Dakota.

Dated May 17, 1900.

In testimony whereof I have hereunto set my hand and affixed the seal of the supreme court of the State of North Dakota, this 25th day of July, A. D. 1900.

[Seal Supreme Court, State of North Dakota.]

R. D. HOSKINS,
Clerk of the Supreme Court of the State of North Dakota.

Endorsed on cover: File No., 17,863. North Dakota supreme court. Term No., 378. Mortimer Webster, plaintiff in error, *vs.* The City of Fargo, James M. Rowe, as auditor of the city of Fargo; D. C. Ross, as county treasurer of Cass county, and O. J. Olson, as county auditor of Cass county. Filed August 6th, 1900.

No. 272.

Motion to advance and

In the Supreme Court of the United States.

Filed Jan. 28, 1901.

October Term, 1900.

MORTIMER WEBSTER, *Plaintiff in Error*,

vs.

THE CITY OF FARGO; JAMES E. ROWE, as Auditor of the the City of Fargo; D. C. ROSS as County Treasurer of Cass County, and O. J. OLSON, as Auditor of Cass County, *Defendants in Error*.

No. 272.

MOTION OF PLAINTIFF IN ERROR TO ADVANCE.

In the Supreme Court of the United States.

October Term, 1901.

MORTIMER WEBSTER, *Plaintiff in Error,*

vs.

THE CITY OF FARGO; JAMES M. ROWE, as Auditor of the the City of Fargo; D. C. ROSS as County Treasurer of Cass County, and O. J. OLSON, as Auditor of Cass County, *Defendants in Error.*

To the above named Defendants in Error and Charles J. Mahnken and S. B. Finney, their Attorneys.

YOU WILL PLEASE TAKE NOTICE, That the Plaintiff in Error will apply to the supreme court of the United States, at the court room in the capitol building of at Washington, on the twenty-eighth day of January, 1901, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for a rule or order advancing the above entitled cause for hearing and fixing the day of hearing thereof at or about the twenty-fifth day of February, 1901, for the reason that other causes involving the same questions, have been advanced and set for hearing on said date. A copy of said application is herewith served upon you.

Dated January 21, 1901.

SETH NEWMAN,
BURLEIGH F. SPALDING,
Attorneys for Plaintiff in Error.

In the Supreme Court of the United States.

October Term, 1901.

MORTIMER WEBSTER, *Plaintiff in Error.*

vs.

THE CITY OF FARGO; JAMES M. ROWE, as Auditor of the City of Fargo; D. C. ROSS as County Treasurer of Cass County, and O. J. OLSON, as Auditor of Cass County, *Defendants in Error.*

MOTION TO ADVANCE CAUSE.

Now comes the plaintiff in error by its counsel and moves this Honorable Court to advance this cause and set it down for hearing on a particular day, as near in the future as may be convenient to the court, and as reasons therefor states:

The matter and the only matter in controversy in this cause is the validity of a statute of the State of North Dakota, to-wit: Section 2280 of the Revised Codes of said state, which is as follows:

"ASSESSMENTS FOR IMPROVEMENTS—HOW MADE.] Whenever any work or improvements mentioned in the preceding section shall have been determined upon and the contract let therefor, the city engineer shall forthwith calculate the amount to be assessed for such improvement for each lot or parcel of ground abutting or abounding upon such improvement. And in estimating the assessment he shall take the entire cost of such improvement and divide the same by the number of feet fronting or abutting upon the same, and the quotient shall be the sum to be assessed per front foot so bound-

ing or abutting, and said estimate shall be filed with the city auditor and shall be presented to the city council for its approval at the first meeting held thereafter. The city auditor shall cause said estimate of the city engineer, together with a notice of the time and place when the council will meet to approve of the same, to be published in the official newspaper of the city for at least ten days prior to the meeting of the city council to approve the same."

Under which section of said statute a special assessment was laid upon the property of the plaintiff in error and charged against his said property abutting upon that part of the street of said city to be paved according to the frontage thereof on said street, and the question arises in a suit brought by the plaintiff in error to enjoin the sale of his property under such assessment and to cancel and vacate said assessment as a cloud upon the title to his said property.

The cause comes to this court on a writ of error from the supreme court of the state of North Dakota, which court held that said statute was not in violation of the fourteenth amendment of the constitution of the United States, and that such assessment was legal and valid, following its decisions in cases arising under the same statute prior to the decision of the case of Norwood vs. Baker in this court.

The questions arising in this case are practically the same as those arising in the case of French vs. Barber Asphalt Paving Company, number 498 on the docket of this court, and practically the same as those arising in the case of the City of Detroit vs. Parker, number 411 on the docket of this court, both of which cases have been advanced for hearing, as plaintiff in error is informed, and set for hearing on or about the 25th day of February, 1901.

To the end therefore that this cause may be heard

in this court at or about the time of said case of French vs. Barber Asphalt Paving Company and the case of the City of Detroit vs. Parker, plaintiff in error prays the court for a rule or order advancing this cause to be heard at or near the time of hearing fixed by the court in said two cases.

Dated January 21, 1901.

SETH NEWMAN,

BURLEIGH F. SPALDING,

Attorneys and Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

October Term, 1901.

MORTIMER WEBSTER, *Plaintiff in Error*,

vs.

THE CITY OF FARGO; JAMES M. ROWE, as Auditor of the City of Fargo; D. C. ROSS as County Treasurer of Cass County, and O. J. OLSON, as Auditor of Cass County, *Defendants in Error*.

STATE OF NORTH DAKOTA,)
) ss.
COUNTY OF CASS.)

Seth Newman, being first duly sworn, says: He is over the age of twenty-one years. That on the 22d day of January, 1901, he served the foregoing notice and motion on Charles J. Mahnken and S. B. Pinney, attorneys for the defendants in error in the above entitled cause, each personally by delivering to and leaving with each a true copy thereof, in said city of Fargo, in said county and state.

SETH NEWMAN.

Subscribed and sworn to before me this 22d day of January, A. D. 1901.

[Notarial Seal.] W. S. STAMBAUGH,
Notary Public, Cass County, North Dakota.

In Supreme Court,

October Term, 1900.

NO. 378.

MORTIMER WEBSTER, PLAINTIFF IN ERROR,

VS.

THE CITY OF FARGO, JAMES M. ROWE, AS AUDITOR OF THE CITY OF FARGO; D. C. ROSS, AS COUNTY TREASURER OF CASS COUNTY, AND O. J. OLSON, AS COUNTY AUDITOR OF CASS COUNTY.

BRIEF OF PLAINTIFF IN ERROR.

IN ERROR TO THE SUPREME COURT OF NORTH DAKOTA.

STATEMENT OF THE CASE.

This cause comes to this court by writ of error to the Supreme Court of the State of North Dakota.

It was brought in the district court of that state, to enjoin the sale of the premises described in the complaint, belonging to plaintiff in error, for the collection of an alleged delinquent special assessment levied

on said premises by the defendant, The City of Fargo, for paving the street upon which the premises abutted, and to declare the assessment void, and cancel the same as a cloud upon the plaintiff's title.

The complaint alleges specifically the due and proper performance of every act by the officers of the city, required by them to be done, essential to the regularity of such assessment, and no question is raised as to such regularity, or as to the validity of the assessment, except, that the statute under which it was levied and the proceedings taken under it are in violation of the Fourteenth Amendment of the Constitution of the United States. (Complaint, pages 4 to 9 transcript).

The defendant demurred to the complaint, on the ground that it "does not state facts sufficient to constitute a cause of action against thedefendants or either of them." (Page 9 transcript).

The only question raised, argued or passed upon, on this demurrer, was the validity of the statute under the Fourteenth Amendment. (Pages 9 and 10 transcript).

The District Court sustained the demurrer, and directed judgment against the plaintiff, (this plaintiff in error), dismissing his complaint on the merits, which judgment was thereupon entered. (Pages 10 and 11 transcript).

From this judgment the plaintiff, (this plaintiff in error), appealed to the Supreme Court of the State of North Dakota. (Page 10 transcript).

The Supreme Court of the state thereupon, (following its former decision in Rolph vs. The City of Fargo, 7th North Dakota 640), gave its judgment affirming the judgment of the District Court. (Pages 13 to 19 transcript).

The plaintiff thereupon sued out a writ of error, and brought the case here.

The Statutes of North Dakota under which the proceedings for this assessment were had are contained in the Revised Codes of said State, and in the laws of 1897 and are as follows, to-wit:

Revised Codes:

Section 2279. Resolution declaring work necessary.

When the city council shall deem it necessary to open, widen extend, wrade, pave, macadamize, bridge curb, gutter, drain, or otherwise improve any street, alley, avenue, lane or highway, or other public grounds within the city limits or extend or improve any public system of water-works exclusively owned and operated by the city for which a special assessment is to be levied, as herein provided, the city council shall, by resolution, declare such work or improvement ne-

cessary to be done, and such resolution shall be published for four consecutive weeks, at least once a week in the official newspaper of the city, and if a majority of the owners of the property liable to be assessed therefor, shall not within twenty days after the expiration of such publication file with the city auditor a written protest against such improvement, then the city council shall have power to cause such improvement to be made, and to contract therefor, and to levy and collect the assessment as hereinafter provided, and all work done under this section shall be let by contract to the lowest responsible bidder therefor.

Section 2280. Assessments for improvements how made.

Whenever any work or improvement mentioned in the proceding section shall have been determined upon and the contract let therefor, the city engineer shall forthwith calculate the amount to be assessed for such improvement for each lot or parcel of ground abutting or bounding upon such improvement. And in estimating the assessment he shall take the entire cost of such improvement and divide the same by the number of feet fronting or abutting upon the same, and the quotient shall be the sum to be assessed per front foot so bounding or abutting, and said estimate shall be filed with the city auditor and shall be presented to

the city council for its approval at the first meeting held thereafter. The city auditor shall cause said estimate of the city engineer, together with a notice of the time and place when the council will meet to approve of the same, to be published in the official newspaper of the city for at least ten days prior to the meeting of the city council to approve the same.

Section 2286. Publication of assessment roll.

After the assessment above provided for shall have been made and approved by the city council, the city clerk or auditor shall forthwith make an assessment roll describing the property so assessed, with the name of the owner if known, and the amount assessed to each lot or parcel of land as approved by the city council and attach thereto a copy of the resolution of the city council approving the same, and certify that the same is correct, and shall file the same with the city treasurer for collection. The city treasurer shall forthwith publish said list three successive weeks, at least once in each week, in a newspaper published in said city, together with a notice that said assessments will become delinquent if the same are not paid within thirty days after the date of the first publication, together with a notice that a penalty of ten per cent will be added thereto after they become delinquent.

Section 2288. Assessments, how paid. Penalty for non-payment.

After the estimate provided in section 2287 shall have been so approved, the auditor shall forthwith make or cause to be made an assessment roll describing the property so assessed, with the name of the owner, if known, and the amount assessed to each lot, piece or parcel of ground as approved by the city council, and attach thereto a copy of the resolution of the city council approving the same, and certify that the same is correct, and shall file the same with the city treasurer for collection. The city treasurer shall publish said list three successive weeks at least once in each week in the official newspaper of the city, together with a notice that a penalty of ten per cent will be added thereto if the same is not paid within thirty days after the date of the first publication, stating the time when such penalty shall accrue.

Section 2294 as amended by chapter 102 laws of 1897.

* * * * * The county treasurer shall collect and enforce the collection of all special assessments, together with the penalty and interest thereon, if any, in the same manner as other taxes, and shall pay over to the city treasurer, on demand, on the first of each month, all sums so collected during the pre-

ceding month and any balance that may be due on the collections of previous months, retaining one per cent thereof as his commission for collecting the same, and shall forthwith notify the city auditor of the amount so paid over, giving a description of the real property upon which the same is paid and the amount of special assessments paid thereon. The filing of a special assessment roll with the county treasurer by the city auditor shall be full and sufficient authority for the collection by the county treasurer of all special assessments therein contained. As soon as any special assessments become delinquent the county treasurer shall deliver to the county auditor the assessment roll containing such special assessments, and the county auditor shall thereupon extend the same upon the tax roll of the county in the same manner as taxes are extended, and the collection of the same shall be enforced in the same manner and by the same remedies as the collection of delinquent taxes is enforced.

Setions 74 and 76 of Chapter 126 of the laws of 1897, in force at time of sale for delinquent taxes at which the lands involved in this suit could have been sold, provided for the sale of lands for delinquent taxes and are as follows, to-wit:

Section 74. Auditor's Notice of Sale.

The county auditor, under the direction of the

board of county commissioners, or a majority thereof, shall give notice of the sale of real property by the publication thereof, once a week for three consecutive weeks, the first of which publications shall be made not less than nineteen days before the day of the sale, in such newspaper as may be designated by the county commissioners for that purpose in the county, if there be one, and if there be no paper published in his county, he shall give notice by a written or printed notice posted on the door of the courthouse or building in which courts are commonly held, or the usual place of meeting of the county commissioners, for three weeks previous to the sale. In counties having daily papers the delinquent tax list shall be published in one issue of the daily edition and in two issues of the weekly edition of the same paper, so selected by the board of county commissioners. Such notice shall contain a notice that all lands on which the taxes of the preceding year (mentioning it) remain unpaid will be sold and the time and place of sale, which time shall be the first Tuesday in the December following, and said notice must contain a list of the lands to be sold and the amount of taxes and penalty due, to which amount the auditor shall add to each description of land so advertised the sum of twenty (20) cents, and for each description of town lots, the sum of ten (10) cents, to de-

fray the expenses of advertising, and the cost of such advertising shall be paid by the county commissioners at the expiration of the sale upon the affidavit of the publisher; provided, that in no case shall the property so advertised be charged for such advertising an amount exceeding the sum actually paid for the same.

Section 76. Auditor to sell at Public Vendue.

Said sale shall be made at public auction at the office of the county auditor or usual place of holding court in the same building, and shall commence at the hour of ten in the forenoon, but may be adjourned from day to day for a period of ten days whenever it is necessary for the disposal of the lands advertised. The lands and lots shall be offered for sale by the county auditor or his deputy in the order in which they appear on the advertised list, and each tract or lot shall be offered separately and struck off to the bidder who will pay the total amount of taxes, penalties and costs charged against it, including any personal taxes specified in the list and in the advertisement, which are a lien upon it, for the smallest or least quantity thereof, which may be designated by any sufficient description. But if the sum bid for the same is not paid before the sales closes, such tract or lot shall again be offered for sale in like manner. The county treasurer shall attend the sale and receive all moneys paid there-

on, and when any tract of land or lot remains unsold for want of bidders the same shall again be offered before the sale closes, and if there is no other bidder he shall bid for the same in the name of th county, and th same shall be struck off and become forfeited to the county. Such tract or lot shall be assessed and taxed like others until the period for redemption expires, but shall not be again offered for sale for such subsequent taxes unless the county has made an assignment of the certificate of sale. And if not so assigned such forfeiture shall become absolute at the expiration of such period for redemption.

The constitution of the State of North Dakota, Section 69, provides: "The legislative assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: * * * * * *

Sub-division 33. The incorporation of cities, towns or villages, or changing or amending the charter of any town, city or village.

Section 70. In all other cases where the general law can be made applicable, no sepcial law shall be be enacted, nor shall the legislative assembly indirectly enact such special or local law by the partial repeal of a general law.

Section 25.

The legislative power shall be vested in a senate and house of representatives.

Section 130.

The legislative assembly shall provide by general law for the organization of municipal corporations, restricting their powers as to levying taxes *and assessments*, borrowing money and contracting debts, and money raised by taxation, loan or *assessment* for any purpose shall not be diverted to any other purpose except by authority of law.

ASSIGNMENT OR ERRORS.

Afterward, to-wit, on the second Monday of October, in this same term, before the justices of the Supreme Court of the United States, in the city of Washington, comes the said Mortimer Webster, plaintiff in error, by Seth Newman, his attorney, and says that, in the record and proceedings aforesaid, there is manifest error in this, to-wit:

That the complaint in said action and the matters therein contained are sufficient in law for the said Mortimer Webster to have or maintain his action aforesaid against the said The City of Fargo, James M. Rowe, as auditor of the city of Fargo; D. C. Ross, as county treasurer of Cass county, and O. J. Olson, as county auditor of Cass county, defendants in error, be-

cause the acts and proceedings set forth in his said complaint as constituting a special assessment against his property, as therein set forth, and the statutes of the State of North Dakota under which said acts and proceedings were had and taken, are in violation of the fourteenth amendment of the Constitution of the United States; and said special assessment constitutes a cloud upon the title of the property of the said Mortimer Webster, and the threatened sale thereof would create irreparabl injury to him.

There is also error in this, to-wit, that by the record aforesaid it appears, that the judgment aforesaid given, was given for the said The City of Fargo, James M. Rowe, as auditor of the city of Fargo; D. C. Ross, as county treasurer of Cass county, and O. J. Olson, as county auditor of Cass county, defendants in error, against the said Mortimer Webster, whereas by the law of the land the judgment ought to have been given for the said Mortimer Webster, against the said The City of Fargo, James M. Rowe, as auditor of the city of Fargo; D. C. Ross, as county treasurer of Cass county, and O. J. Olson, as county auditor of Cass county, and the said Mortimer Webster prays the judgment aforesaid may be reversed, annulled, and held for nothing, and that he may be restored to all things which he has lost by occasion of the said judgment.

ARGUMENT.

The Statute, Section 2280 Revised Codes of North Dakota, and the proceedings taken under it for the assessment of the real property of plaintiff in error, are in violation of the fourteenth amendment of the Constitution of the United States, because the enforcement of the statute, and sale of the property of the plaintiff in error by virtue of the assessment levied under it, will deprive him of his proprty without due process of law, and will deny him the equal protection of the law.

It will do this:

1. Because it imposes upon particular private property, the *entire cost* of a local public improvement, irrspective of the pecuniary and exceptional benefits accruing to it from such improvement.

2. Because it proceeds by a rule or system which absolutely and entirely precludes the consideration of special benefits.

3. Because the apportionment of the assessment, by the legislature is the assumption and exercise of judicial power.

4. Because the state legislature assumes to declare by a general law, that under all circumstances and conditions, in all cities or parts of cities, present or prospective, the benefits accruing to private proper-

ty abutting on improvements, contemplated by section 2279, will equal or exceed the entire cost of such improvement, and will be, as to each particular parcel of such property, exactly in proportion to its frontage. A judicial function and determination, proceeding without investigation or evidence, and dependent solely upon the fiat of a legislative body.

5. Because the statute does not give the property owner affected by the assessment any "right to show that the sum assessed against his property is in excess of the benefits received" or any opportunity to be heard as to the justice of the assessment.

6. Because the statute and the proceedings taken under it are arbitrary, oppressive and unjust.

General Taxation:

But two methods for the taxation of real property are recognized in this country: First, general taxation. Second, special assessments.

Both must be for a public purpose and based on public necessity or requirements, that of general taxation on the necessity for protection to the life, liberty and property of the citizen, and promotion of his welfare. And the benefits accruing from general taxation affect all citizens alike within the district tax and consist in the protection of their life,

liberty and property and of the right to pursue the usual avocations of life, and to acquire and enjoy unmolested the fruits of their exertions; in short to enjoy all the blessings of a good and stable government. These benefits are of undeterminable value, personal in their nature and incapable of pecuniary estimate. As these benefits affect the citizen most largely in the acquisition, possession and enjoyment of property, it seems just that the burden general of taxation should be borne by all property alike according to its value.

Local Taxation:

Local taxation is general taxation for certain limited local purposes, conferred on and exercised by local communities exercising governmental functions within certain limitations, for such purposes, and within defined districts, and enjoying as to those functions certain privileges of self government not possessed by all communities throughout the state. The benefits of such taxation are general in their nature within the local community, and are indeterminable and incapable of exact pecuniary estimation, and affect all members of such community uniformly.

Special Assessment:

Special assessments are assessments levied upon particular property for making a specific local improvement, which property will be affected by such

proposed improvement, and will derive from such improvement exceptional benefits in the enhancement of its value and are laid upon the basis of and solely with reference and in proportion to such exceptional benefits.

The benefit of a street improvement is twofold:

1. A general benefit to all members of the local community, in the increase of the ease, comfort and facility it affords them in the use of the street; the improvement of the sanitary conditions of the neighborhood, etc. This benefit is the same as that for which general and local taxes are levied. It is general in its nature, incapable of pecuniary estimate, and reaches all members of the local community alike. It is limited only by the necessity for the improvement.

2. A special, pecuniary and exceptional benefit to those members of the local community who own real property abutting on the improvement, or in near proximity, in the enhancement of the value of such property; a benefit the amount of which is easily ascertainable by the usual method of ascertaining values of property, that is, by the evidence, expert in its nature, of men familiar with the subject and competent to testify, or by any other equivalent method. Assessments laid for such improvement without reference to such benefits are general taxation. Special assessments can only be justified when levied in *accordance with*

such benefits and *not in substantial excess thereof. No other basis is known to the law on which they can rest.*

The general benefits of a local improvement being limited only by its necessity; it may be made by general taxation, and the determination of whether or not it shall be so done, is purely legislative.

The construction of such local improvements, by general or local taxation, will however, necessarily result in *enriching* those individuals who own real property abutting on the improvements, to the extent that it actually increases the value of such property, and this at the expense of the general tax-payer, thus impoverishing the general tax-payer ostensibly for a public purpose, but with the direct and necessary result of adding to the value of private property a clearly ascertainable amount.

This is fundamentally unjust.

Justice requires alike that no individual shall be enriched at the public expense or impoverished for the public benefit beyond any other member of the general public affected by the tax, or any other particular individual affected by the improvement.

Upon this theory and under this beneficent doctrine has originated the power and system of special assessment for local improvements; the power to compel each parcel of property, directly enhanced in value

in a definite and ascertainable amount, by a given local improvement, to contribute a portion or all of such amount to defray the expense of making the improvement, which has resulted in such benefit.

If such contributions to the extent of the increased value of the property benefited, are insufficient to defray such expense, the necessity for the improvement furnishes a just reason, for payment of the balance by local txation bearing alike on the whole local community.

The power of determining whether the expense of the improvement shall be defrayed by general taxation, or special assessment, is purely legislative.

If by general taxation, it must proceed upon the well known and well defined principles governing that subject, and not by methods resulting in confiscation.

If by special assessment, it must be based on the just principles underlying such assessment, or it becomes confiscation.

The doctrine that special assessments for local improvements are based upon exceptional benefits, resulting to property in the vicinity, by the construction of such improvements, and must be laid with reference to such benefits, has become the firmly established and universally conceded law of the land, except in North Dakota.

Peo. v Mayor, 4 N. Y. 425.

Chicago v Larned, 34 Ill. 203.

Dexter v. Boston, 57 N. E. Rep. 379, (Mass.)

Hascombe v. Omaha, 7 N. W. Rep. 739 (Neb).

State v. Patterson, 5 At. Rep, 896, (N. J.)

Report of Commissioners, 10 At. Rep. 363 (N.J.)

Gilmore v. Heutig, 5 Pac. Rep. 781, (Kan.)

Denver v. Knowles, 17 L. R. A. 142, (Col.)

Creighton v. Manson, 27 Cal. 621.

Taylor v. Palmer, 31 Cal. 254.

Tide Water Co. v. Costen, 90 Am. Dec. 641 (N.J.)

Nichols v. Bridgeport, 23 Conn. 189.

Chamberlain v. Cleveland, 34 Ohio St. 551.

State v. District Court, 29 Minn. 62.

State v. Seymour, 35 N. J. L. 49 .

Dyar v. Farmington, 70 Me. 515.

Barnes v. Dyer, 56 Vt. 466.

State v. Newark, 18 Am. Rep. 729. (N. J.)

Seeley v. Pittsburg, 22 Am. Rep. 760, (Pa.)

Hammett v. Philadelphia, 3 Am. Rep. 615, (Pa.)

Violet v. Alexandria, 23 S. E. Rep. 909, (Va.)

State v. District Court, 33 Minn, 306.

Washington Avenue, 69 Pa. St. 352, 8 Am. Rep. 255.

Thomas v. Gain, 35 Mich. 155.

Peo. v. Lynch, 51 Cal. 15.

State v. Commissioners, 20 Am. Rep. 380.
Johnson v. Milwaukee, 40 Wis. 315.
In re Mead, 74 N. Y. 221.
Petition of Roberts, 81 N. Y. 67.
Neenan v. Smith, 50 Mo. 525.
Crow v. Tolans, 96 Ill. 255.
Wolf v. Philadelphia, 105 Pa. St. 25.
Raleigh v. Peace, 14 S. E. Rep. 525, (N. C.)

All courts, except in North Dakota, concede and maintain the doctrine, but differ as to the source of the power to make the determination of the benefits and the apportionment of the assessments.

Rule in North Dakota:

The Supreme Court of North Dakota in its decisions in Rolfe v. The City of Fargo, 7th N. D. 640, and in the case at bar, 82 N. W. Rep. 732, has made the widest departure yet made from this rule.

Its decisions were upon the statute involved in this case and were the logical and inevitable conclusions necessary to uphold the statute.

Character of the Statute:

The court was confronted with a statute which imposed a uniform assessment for the *entire cost* of local

improvements upon the real property abutting on such improvement *according to frontage*, to be determined by a fixed arbitrary and invariable rule of mathematical calculation, into which no element of the exercise of judgment entered; in cities present and prospective, under all conditions, in all circumstances and at all times; a statute which as effectually precluded the consideration of benefits as though it had positively in terms prohibited such consideraton, and refused the property owner a substantial hearing on the justice of the assessment.

The court found, if it based the right of special assessments upon the doctrine stated, it must concede to the legislature attributes in the nature of omniscience and omnipotence and that it was therefore necessary either to abandon the establishd basis upon which such assessments have always been held to rest, or destroy the act of the legislature.

Without hesitation therefore the court proceeded to place the power to levy special assessments upon the same basis as the power of general taxation, that of theoretical, hypothetical and indeterminable benefits common to all within the improvement district alike; pertaining rather to the person than to his property, and, ignoring entirely the pecuniary advantages or exceptional benefit to individual property necessarily aris-

ing from the improvement, it assimilated special assessments to local taxation, with this difference, however, that whereas general and local taxation are limited in method by the State Constitution, and must proceed according to valuation of property, special assessments, while proceeding upon the same principles as general taxation, are exempt from the limitations of the Constitution, and the exaction may be made in any manner the unlimited power of the legislature shall dictate, and without interference by the courts. While eliminating the principle underlying special assessments it retained the form, name and methods.

Opinion of the N. D. Court:

The Court says: 7th N. D. page 647.

"When the tax-payer is called upon to contribute for general purposes, he is not permitted to challenge the legality of the tax on the ground that he has not received a pecuniary benefit commensurate with the sum he is required to pay. Whence comes the right of the courts to accord to him this peculiar privilege in cases of local assessment? It is right here that the fallacy of the cases which support the view of counsel for plaintiff lies. They differentiate, but on what principle it is impossible to discover, local assessments from general taxes. They admit that the question of benefits is only one of general theory when taxes are being apportioned

for ordinary purposes. But straightaway a new doctrine comes in play when the very same taxing power is exercised for an object which is as much public as the expenses of the administration of government. This doctrine has no foundation in reason, and it would never have been enunciated had it not been that it was more easy to discover particular hardships in cases involving local assessments, and had not the courts fancied that unless they intervened the property of the citizen was doomed to confiscation from the abuse of this power. What is it that distinguishes a local assessment from a general tax? Their points of resemblance are numerous. Each is an exercise of the taxing power, pure and simple. The burden is spread over a taxing district, and is apportioned according to some rule. The purpose for which the tax is levied is public.

The general theory on which rests, in each case, the imposition of the particular burden upon the particular taxing district, is the benefit derived by the taxpayers therein from the application of the moneys so raised to the public purpose for which the tax is levied. It is because the law assumes a *general benefit to the people of a particular district* that it permits the tax to be levied upon that district. It is *not* because each tax-payer is supposed *to receive an exact money equivalent that he is requested to pay*. But, because the

tax is one which pertains to that district, it therefore is levied thereon, to be apportioned in such manner as the constitution points out, if it speaks at all on the subject, or as the legislature directs, in case the fundamental law is silent. So, when a local assessment is levied, the question *is not how much, in dollars and cents, each parcel of land has been enhanced in value* by the local improvement, *but what is the particular district which is, in a general sense, peculiarly benefited* by the improvement; and, when this is once ascertained, then there remains only the question of the apportionment of the tax to be made in accordance with the constitution, if it regulates the matter, or as the legislature shall direct, when its discretion has not been limited by the organic law. The only marked point of difference between a tax and a local assessment is that the former is spread over a permanent taxing district, while the latter is to be collected from a special and temporary taxing district, created for that single purpose, because the benefit of the public improvement is so peculiarly local that to require all the tax-payers of the general taxing district to pay for it would be palpably unjust. *The same general principles govern an exercise of the power of levying local assessments as apply to the exercise of the taxing power for general purposes.* * * * *

What is it that so differentiates the power of local

assessment from the power of general taxation that in one case the sovereign must give back in value all that is taken, while in the other it can, if necessary (unless there be constitutional checks), take from the citizen all his property, without reference to his receiving in return any commensurate advantages or any benefit at all? Until this question is answered in favor of such a distinction, *it is idle to talk of the enhanced value of the land assessed as the limit of the power of local assessment.* When such an assessment is levied upon property for a particular improvement, a tax is as much collected as when the expense of the work is charged to the general tax levy. *The only distinction is that the district is narrower, and the mode of apportionment different.* Usually, too only real property is considered in making the apportionment, and not all property, real and personal. *In all other respects the two classes of cases are identical. The same power of taxation is exercised in each instance,* and except with respect to constitution restrictions or inherent limitations, *the legislative discretion is, in both classes of cases absolute.* We have already referred to those limtiations which inhere in the very nature of the taxing power. None of them affect the question before us. The assessment is for a public purpose. It pertains to the district within which it is to be collected, and it is appor-

tioned according to a uniform rule. When we turn to the constitution for light, we find there no provision which relates to local assessments except the one which directs the legislature to restrict the power to make such assessments when exercised by municipal corporations.

The North Dakota court has thus completely abolished the distinction in principle between general taxation and special assessment based on exceptional benefit for local improvement. It places them on the same general basis, declares that they are governed by the same character of general underterminable benefits.

It says: "The only distinction is that the district is narrower."

If so if it possesses no other element to differentiate it from general taxation, then it is governed by the same constitutional provision as other general or local taxation and must proceed under the restrictions and limitations of the state constitution.

It must be uniform and based upon the valuation of property. If the view of the North Dakota court is to be sustained then the statute deprives plaintiff in error of the equal protection of the laws in that it requires his property to be taxed by a rule different from that prescribed by the constitution of the state for the general taxation of property; a rule not proceeding with

any uniformity or upon valuation, but arbitrary, oppressive and unjust. The mere fact of the difference in the size in the taxing district does not provide a reason or basis for classification as to method of imposing a tax.

Gulf Railway v. Ellis, 165 U. S., 150.

R. R. Tax Cases, 13 Fed. Rep. 722.

Telephone Cases v. Board of Equalization, 85 Fed. Rep. 303.

Nashville R. Co. v. Taylor, 86 Fed. Dep. 169.

Judicial nature of power.

The North Dakota court, and other courts which have sustained front foot assessments, especially under general statutes, notably California and Missouri, (Hadley v. Dague 62 Pac. Rep. 501 (Cal.); Heman v. Allen 57 S. W. Rep. 559 (Mo)) have been compelled to do so upon the ground that the apportionment of the assessment, that is the determination of the exact amount that a given piece of property shall pay, *is an exclusively legislative prerogative.* We concede that the determination of the necessity, propriety and expediency of the improvemnt is a purely legislative prerogative.

If the basis of such assessments is the same as that of general taxation, if they do not rest on exceptional benefits in the definite enhancement of value of the property assessed, but on general undeterminable benefits, then the determination of the limits of the district benefited, and *in which all property must be taxed*, is a purely legislative function.

If, however, such assessments do rest, and can only be justified, upon the doctrine of such exceptional benefits, and the determination of the area of the benefited district *includes* the determination that all property within that district *must* be assessed, then such determination, and also the determination of the amount of each individual assessment requires the determination of the values of property, and this renders the powers exercised in such determination, purely judicial; and such powers must be committed to judicial or quasi-judicial tribunals created by the legislature and clothed with power to make the determination.

The legislature may create courts and provide their powers, but it cannot resolve itself into a court; its powers are purely legislative.

Constitution of North Dakota, Sec. 25.

It cannot hear and determine controversies relating to private property rights; such an assumed power would be usurpation and not due process of law.

Under the doctrine of special assessments for which we contend, the question of whether each particular piece of property within the taxing district is exceptionally benefitted,and the amount of such exceptional benefit, require inquiry into the values of property, and the amount of the increase of such value by the improvement. The basis of the determination of the amount of the exceptional benefit is the difference between the value of the property without the improvement and with it.

People v. Mayor 63 N. Y. 299.

Cooley on Taxation (1 Ed.) 459. 2 Ed. 660.

This requires a determination of values not different from that required for the valuation of property for purposes of general taxation.

In one case the citizen is to be deprived of his property for the public benefit by a process based on the total valuation of his property; in the other on the basis of the increased valuation of that portion of his property benefited by the improvement. In either case the investigation must proceed on evidence expert in its nature, the opinions of men familiar with the subject, and it would be a strange anomaly and injustice in

the law if the citizen, who must part with his property upon this determination, was not permitted to rebut the evidence against him, or could not be heard as to the justice of the exaction.

Such investigation and determination are purely judicial in their nature and cannot be assumed or made by the legislature.

Monongahela Co. v. U. S. 148, U. S. 327.

It is elementary that the citizen has no constitutional right to be heard with reference to the justice of any act purely legislative in its character.

It is equally elementary that every citizen has a constitutional right to be heard in *any judicial or quasi judicial proceeding by which he is to be deprived of his property.*

This Court has frequently held that in assessments of this character, when provision was made in the law giving the property owner whose property was assessed *an opportunity to be heard as to the justice of the assessment* before a tribunal *clothed with the power of correcting such assessment in accordance with justice* he was not deprived of his property without due process of law

Davidson v. New Orleans, 96 U. S. 97, L. Ed. 24-616.

Walston v Nevin, 128 U. S. 578, L Ed. 32-540.

Paulson v. Portland, 149 U. S. 30, L. Ed. 37, 627.

Hagar v. Reclamation Dist. 111 U. S. 701, L. Ed. 28. 569.

Spencer v. Merchant, 125 U. S. 345, L. Ed. 31. 763.

Palmer V. McMahon, 133 U. S. 660, L. Ed. 33. 772.

Irrigation District v. Bradley, 164 U. S. 112, L. Ed ●. 41. 369.

Conversely, in such a case, if he is not by the law furnished with such opportunity, he is deprived of his property without due process of law.

Judge Dillon says: "Whenever the principle is adopted that assessments for local improvements can be justified only to the extent of special benefits actually received and must be apportioned according to benefits, * * * * * * the question of the existence and extent of benefits becomes in its nature judicial."

Dillon Municipal Corporations, 4th Ed.

Judge Cooley in speaking of assessing officers says:

"That the duty of these officers calls into action the judicial function is unquestionable."

Cooley on Taxation, 2d Ed. 788.

In Reagan v. Trust Co., 154 U. S. 399, this court says:

"It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to divest the other party of any rights of person or property; in every constitution is the guarantee against the taking of private property for public purposes without just compensation. The equal protection of the laws which, by the fourteenth amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is without compensation wrested from him for the benefit of another or of the public."

In Palmer v. McMahon, 133 U. S. 660, it says:

"Assessors exercise quasi-judicial powers in arriving at the value and opportunity to be heard should be and is given under all just systems of taxation according to value."

The courts of Pennsylvania, Rhode Island and Minnesota deny the legislative power to impose front foot assessments except in densely populated districts; a recognition that the power is not a legislative prerogative.

Seeley v. Pittsburg, 82 Pa. St. 360.

Sperry v. Flygare, 83 N. W. Rep. 177. Minn.

Cleveland v. Tripp, 13 R. I. 61.

See also Newby v. Platt, 25 Mo. 272.

Sedgewick on Constitutional Law, 169, 174-175 and 177.

Norfolk v. Ellis, 26 Grattan, 242. (Va.)

Under the authorities we conclude the law to be that the legislature may determine the necessity, propriety and expediency of the improvement and the district within which the assessment shall be levied, and that this is a purely legislative function. That the determination of the particular pieces of property within the district which are benefitted, and the amount to

which each is benefitted, and which it *must* pay as an assessment for making the improvement is a judicial inquiry and determination.

It is conceded that numerous cases have sustained the power of the legislature *by special legislation* to direct a levy for the cost of local improvements by front foot assessments *without abandoning the principle of exceptional benefits* and this *upon the theory that the legislature was competent to determine the fact that the cost did not exceed the benefits and that all property* taxed was *equally benefitted in proportion to its frontage.*

This conclusion, however, has usually been announced by naked asseveration of such power rather than by a statement of the reasons for its existence, and it is difficult to understand upon what basis of reason such decisions rest.

Constitutional limitation of value.

Under the constitutional limitation that all property shall be taxed uniformly according to its value, and in the absence of any provision for, or recognition of special assessments, taxes for local improvements can only be laid on property on a money valuation.

McBean v. Chandler, 9 Heisk 349 (Tenn.)

Stinson v. Smith, 8 Minn. 366.

Bidwell v. Coleman, 11 Minn. 78.

Comrey v. Folsom, 13 Minn. 219.

Under such a constitution, recognizing or authorizing special assessments, they must be levied *on the ground of special benefits received by specific property assessed.* This is the only basis recognized by the authorities for the imposition of such burdens. The fact that it is an "assessment of benefits," *is the only consideration which removes it from the valuation clause* of the constitution. The elimination of that element at once brings the tax within the provisions of the constitution requiring uniformity and valuation.

Violet v. Alexandria, 92 Va. 579.

Morrison v. Morey, 146 Mo. 561.

Constitutional rule.

An assessment of benefits for public improvements can only be imposed in proportion to, and not exceeding the exceptional benefit accruing to the property assessed in enhanced value, by reason of the improvement not common to other property not so assessed, within the limits of the taxing district; an imposition of the en-

tire cost of the improvement by special assessment without regard to benefits is void.

Norwood v. Baker, 172 U. S. 269, L. Ed 41. 443, and the cases and authorities cited in the prevailing opinion.

The imposition of the entire cost of the improvement in a particular district regardless of exceptional benefits can only be made on the ground of general benefits to the community and must under the constitution of North Dakota, be by value.

Review of cases.

The North Dakota court, in its opinion in the case at bar, based its refusal to follow the decision of this court in the case of Norwood v. Baker, Supra, upon the ground as expressed by that court that "we do not believe it was the intention of the Federal Supreme Court to depart from the line of its former decisions."

An examination of the former decisions of this court will show the fallacy of this reason. The cases decided in this court arising in the District of Columbia are not applicable.

The power of taxation by congress in the District of Columbia is without constitutional limitation of any

character, except that it must not deprive the citizen of his property without due process of law.

The method of apportionment is entirely within the discretion of congress. There is no provision guaranteeing equal protection of the laws.

The requirement that taxation shall be for a public purpose,and uniform,arises rather from the underlying principles of justice on which the government rests than from the constitution. The principle of uniformity *in methods of taxation is not even recognized,* and congress may tax by valuation for one purpose, by area for another, by frontage for another and according to benefits for another. Its discretion is plenary.

We search the constitution in vain for any restriction, limitation or regulation of the power other than the general one above stated.

The case of Parsons v. District of Columbia, Supra, is not in point for other reasons.

The assessment was to provide a comprehensive system of water supply for the district; an exercise of purely police power for the protection of the public health and the protection of property from destruction by fire and promote the public convenience. It was in no sense a special assessment for street improvement, and the benefits to result from the system of water supply were general and personal in their nature

rather than exceptional to the property asssed; and the method of assessment was one of the methods of general taxation to which congress might resort whenever in its judgment such a course was advisable.

Would not the imposition of a general tax for all municipal purposes according to area be within the limitations of the Federal Constitution? Does that instrument prohibit congress taxing horses and cattle per capita, or carriages and all other personal property by the article? And is not the decision of congress upon the methods and rule of apportionment of all taxes within all territory under its exclusive jurisdiction final as an exercise of purely legislative power? We fail to find any provision in the Federal Constitution which requires a negative answer.

Judge Cooley recognies this doctrine. He says: "If the right to impose a tax exists, it is a right which in its nature acknowledges no limitations. It may be carried to any extent within the jurisdiction of the state or corporation which imposed it, which the law of each state or corporation may prescribe.

Constitutional Limitations 591.

Congress as to municipalities within territories

and the District of Columbia might doubtless give larger powers of taxation than could be conferred by the states.

Cooley on Taxation, 2nd Ed. 344.

In Spencer v. Merchant, Irrigation District v. Bradley, Davidson v. New Orleans, Walston v. Nevin, Paulson v. Portland and Hagar v. Reclamation District, cited by the North Dakota Court, *the question of opportunity to be heard on the justice of the assessment* was the Federal question discussed and decided. It was assumed that the tribunals before whom the hearing was authorized were clothed with the power to do justice in the premises, and adjust the apportionment to that end. *If justice required these assessments to be adjusted according to and not in excess of benefits, they might be so adjusted.*

It is impossible to discover the application of either of these cases to a case where the assessment is apportioned by a rule of final and unchangeable mathematical computation.

In Irrigation Dist. v. Bradley 164 U. S. 112, the question was whether an assessment according to value with a full hearing was valid. It was so held.

The North Dakota Court *concedes* that the statute in question gives *no opportunity for a hearing on the justice of the assessment.*

It says: (7th N. D. page 671).

"The conclusion we have reached as to the legality of the statute, in so far as it requires all the expenses of the improvement to be assessed against the abutting property in proportion to frontage, leads necessarily to the further conclusion that there is no force in the contention of counsel for plaintiff that the tax-payer is not allowed a hearing by the law. *It is true that he is given no hearing on the question of benefits.* But he is furnished with an opportunity *to demonstrate that the assessor* in apportioning the tax according to frontage *has committed an error* by charging up against his land a larger sum than should be assessed against it.

Section 2280, Rev. Codes:

The right to a hearing at some stage in the proceedings is universally recognized where the apportionment of the tax involves the exercise of an act judicial in character; for instance, an assessment according to benefits.

Uhman v. Mayor, etc., (Md.) 20 Atl. Rep. 141, 21 Atl. Rep. 709.

Mayor, etc., v. Uhman, (Md.) 30 Atl. Rep, 43.

Mayor, etc., v. Scharf, 54 Md. 499.

Spencer v. Merchant, 125 U. S. 345, 8 Sup. Ct. 921.

Lent v. Tillson, 140 U. S. 316, 11 Sup. Ct. 825.

Violett's Heirs v. City Council of Alexandria (Va.), 23 S. E. Rep. 909.

Dietz v. City of Neenah (Wis.), 64 N. W. Rep. 299.

Spencer v. Merchant, 100 N. Y. 585, 3 N. E. Rep. 682.

Cooley Tax'n, 655

Stuart v. Palmer, 74 N. Y. 183.

But there is authority for the proposition that, when the apportionment of the assessment *involves only a matematical calculation*, the tax-payer is not entitled to be heard.

Cases Following Norwood v. Baker:

The case of Norwood v. Baker has been followed by all federal courts and by most state courts in cases of this character decided since.

Co. of Ramsey v. Robert P. Lewis Co., Minn., Feb. 8, 1901.

State of Minn. v. Pillsbury, Minn., Feb. 8, 1901.

Fay v. Springfield, 94 Fed. Rep. 409.

Loeb v. Trustees, 91 Fed. Rep. 37.

Charles v. City of Marion, 98 Fed. Rep. 166, 100 Fed. Rep. 538.

Lyon v. Town of Tonawonda, 98 Fed. Rep. 361.

Cowley v. City of Spokane, 99 Fed. Rep. 840.

Hutchinson v. Storrie, 92 Tex. 688, 51 S. W. Rep. 848.

Sears v. Street Com. 173 Mass. 350.

Adams v. City (Ind.), 57 N. E. Rep. 114.

McKee v. Town of Pendleton (Ind.) Id. 532.

Dexter v. Boston (Mass.), 57 N. E. Rep. 379.

Parker v. City of Detroit, 103 Fed. Rep. 357.

Bidwell v. Huff, Id. 363.

Those courts which have refused to follow the ruling in the Norwood case, or expressed themselves as dissatisfied with the doctrine, are New York, Michigan California and Missouri in the following cases:

Heeman v. Allen, 57 S. W. Rep. 559 (Mo.)

Conde v. City of Schenectady (N. Y.), 58 N. E.

Rep. 130.

Hadley v. Dague (Cal.), 62 Pac. Rep. 501.

Barber Asphalt Paving Co. v. French, decided Nov. 13, 1900, Mo. Sup. Ct.

We cannot refrain from calling the attention of the court to the opinion in the Ramsey County, Minnesota, case with reference to the decision in the case of Norwood v. Baker: "The cases recited and reviewed show that the court was careful to lay the foundation of its conclusions, that the legislative power in respect to local assessments is not absolute but is confined within certain limits; that it was the intention of the court to lay down a rule of law broad enough to embrace the logic and raesoning of the discussion, seems to us indisputable. It cannot be that the court's conclusions were intended to be limited to a technical construction of the Ohio statutes, as intimated in Webster v. City of Fargo, 82 N. W. 732, and Cass Farm Co. v. City of Detroit, 83 N. W. 108 and in Harman v. Allen, 57 S. W. 559. The principle involved was not necessarily confined to "street opening" cases. The same principle was recognized by the court as applicable to all classes of local improvements, whether in the open-

ing, grading and paving of a street, or in the construction of a sewer, or the laying of a water main. This appears from the scope of the investigation and the nature of the cases reviewed. That the court intended to give voice to a general principle and not to a narrow construction, is furthr evident from the language with which the opinion closes. That the decision rested upon the doctrine that there was a limit to the legislative power, appars from the fact that the dissenting opinion is based upon a denial of the soundness of such conclusion.* * * * * * * The stake driven by the decision in Norwood v. Baker is timely. Judicial expression on the subject was indefinite. There was a tendency to lose sight of the equitable basis which justifies the assessment upon private property of the cost of public improvements. The arbitrary act of the legislative body was often accepted as final without regard to its justice. It is to be hoped that the highest court of the land has spoken finally, and will not recede from its position."

The case of State v. Wheeler in the same court, 83 N. W. 108, presented an entirely different question and is no authority against the rule announced in Norwood v. Baker. In that case the board of public works, a board capable of being clothed with quasi-judicial powers, found that the rule that property abutting

on that part of the street which was to be paved, or specially benefited, at least to the extent of the entire cost, that such benefit was wholly confined to such abutting property, and that all of such property, that is each lot was uniformly and equally benefited per front foot; and on this finding the board of public works assessed the property by the front foot. The case is in principle clearly within the doctrine established in Norwood v. Baker.

The court in Heman v. Allen, Supra, places its decision upon the ground: first, that the case of Norwood v. Baker was *a street opening case;* second, that *the decision was by a divided court;* reasons which would seem entirely unsatisfactory.

In Hadley v. Dague, Supra, the court holds that assessments by the front foot rule must be held valid, notwithstanding the decision in the case of Norwood v. Baker, unless the record shows that there is substantial proof showing that the assessment was actually in substantial excess of the benefits. It recognizes the rule established in Norwood v. Baker, but holds that notwithstanding the assessment is contrary to the fourteenth amendment, nevertheless, it must be held valid, unless the property owner shall show that he is assessed in excess of the benefits to his property; a ruling which seems to us unsustainable on any principle of law un-

der the authorities, and directly in conflict with the ruling in Norwood v. Baker on this question.

In Conde v. City of Schenectady, the court, while disapproving of the rule established in Norwood v. Baker, decides the case upon other grounds, so that the decision in that case cannot be construed as a decision against the principles enunciated in the case of Norwood v. Baker.

Arbitrary Character of the Law:

The assessment in question proceeds upon a rule that is arbitrary and necessarily produces injustice and oppression.

No better illustration of this fact can be cited than the facts existing in the Norwood case and in the case of Ramsey County v. Lewis Co., Minnesota, recently decided, and such injustice is liable to be repeated in every case under the rule.

It is a matter of common knowledge that in cities of small size the principal streets extend from the business and densely populated centers through the outskirts to the limits of the city, and in the business portions of the city the lots are narrow, abutting upon the street on their narrowest dimensions, while in the outskirts they are liable to be platted fronting on the cross streets and abutting the longest dimension upon the street to be improved.

A lot 25 by 150 feet in the business portion of the city worth $10,000 might be benefited by the pavement $1,000; a lot of the same dimensions abutting upon the street by its longest side might be worth $500 and increased in valuation by the improvement $50. Assuming the cost of the pavement to be $5,— per front foot, the first lot would pay $125. for the improvement which would improve its value to the amount of $1,000; the lot in the sparcely settled portion of the city would pay $750 for the improvement, being largely in excess of the entire value of the property with the improvement. The result would be an absolute confiscation of the outer lot for the benefit of the inner one. This result is liable to happen in every instance in which the whole length of a street in a small city, or in a large one for that matter, is paved under this rule.

While this may be considered simply an inequality in the operation of the law, it is so grossly an injustice as to come within the definition of a denial of the equal protection of the laws and to bring it within the objection that it is deprivation of the property of a citizen without due process of law.

In Davidson v. New Orleans, Supra, Justice Bradley says: "I think, therefore, we are entitled, under the fourteenth amendment, not only to see that there is some process of law, but 'due process of law,'

provided by the state law when a citizen is deprived of his property; and that, in judging what is 'due process of law,' respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and if found to be suitable or admissible in the special case, it will be adjudged to be 'due process of law,' *but if found to be arbitrary, oppressive and unjust*, it may be declared to be not 'due process of law.'

Binding Force of State Decisions:

The decisions in the North Dakota cases is contrary to, and irreconcilably in conflict with the decision of this court in the case of Norwood v. Baker, *Supra*, and in cases of this character the rule of the state court will not be followed.

Whenever any department of the state government exercises a function not properly belonging to it, if its action affects private rights, the fourteenth amendment is violated and the state authority losses its force.

Gelpecke v. City of Dubuque, 1 Wallace, 176.

Kilbourne v. Thompson, 103 U. S. 190.

Necessity for Hearing:

The assessments levied under the statute in question and in consideration in this case *are an exercise of the power of assessments for local improvement and their constitutionality must be determined under the principles controling this power of assessment as distinguished from principles applicable only to general taxation.*

The right to be heard in cases of this character is a constitutional one and indefeasible. The law in question makes no provision for a hearing and gives to plaintiff in error no opportunity to be heard as to the justice of his assessment. It is therefore within the fourteenth amendment.

Stuart v. Palmer, 74 N. Y. 183.

Davidson v. New Orleans, *Supra.*

Walston v. Nevins, *Supra.*

Paulson v. Portland, *Supra.*

Hager v. Reclamation District, *Supra.*

Spencer v. Merchant, *Supra.*

Proof of Benefits:

The city proceeded upon the theory, justified by the words of the statute, that the *entire cost* incurred in the improvement could be put upon the abutting pro-

perty by front foot assessment irrespective of the special benefit. The assessment in controversy was by the front foot, and for a specific sum representing its proportional cost of the whole improvement, and that sum could not have been reduced under the statute even if proof had been made that the amount assessed exceeded the special benefit. The assessment was in itself an illegal one because it rests upon a basis that excluded any consideration of benefits. No proof was therefore necessary or proper to show that the assessment was not in excess of benefits. The only appropriate decree was one enjoining proceedings under the law.

Norwood v. Baker, Supra, 291.

Tender:

The case is one in which the entire assessment is illegal and in violaton of the provisions of the fourteenth amendment. The plaintiff in error was therefore entitled, without making any tender of any portion of the assessment, to ask the court to enjoin the enforcement of the rule of assessment that infringed upon his constitutional rights.

Norwood v. Baker, Supra, 293.

We are profoundly conscious of the gravity of the power we are asking this court to exercise, the power to arrest the proceedings of a sovereign state, which we believe to be in violation of the protection of our property rights which the Constitution of the United States guarantees.

We are equally conscious that the burden is upon us to show to the court that we are entitled to that protection. This we believe we have done.

We ask that the judgment of the state court be revised.

SETH NEWMAN,
BURLEIGH F. SPALDING,
Counsel for Plaintiff in Error.

In Supreme Court

OF THE UNITED STATES.

October Term, 1900.

NO. 379.

MORTIMER WEBSTER,

Plaintiff in Error.

VS.

THE CITY OF FARGO, *et al.*

Defendant in Error.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR.

REVIEW OF CASES.

NORWOOD V. BAKER, 172 U. S. 769.

The statute involved in the case of Norwood v Baker provided that the assessments "shall be assessed by the council on the abutting and such adjacent and contiguous or other benefited lots and lands in the corporation, either in proportion to the benefits which may result from the improvement, or according to the value of

the property assessed, or by the front foot of the property bounding and abutting upon the improvement, as the council by ordinance setting forth specifically the lots and lands to be assessed, may determine before the improvement is made, and in the manner and subject to the restrictions herein contained; and the assessments shall be payable in one or more instalments, and at such times as the council may prescribe," and gave no opportunity to the property owner to be heard in case the council should see fit to levy the assessments according to the front foot rule.

McMillan v. Anderson, 95 U. S. 37. L. Ed. 24-335, was a case of a license tax and is inapplicable to the case at bar. It is conceded that as to license taxes and taxes of that character no hearing need be given.

In Davidson v. New Orleans, 96 U. S. 97. L. Ed. 24, 616, the court says: "That whenever by the laws of a state, or by state authority, a tax, assessment, servitude, or other burden is imposed upon property for the public use, whether it be of the whole state or of some more limited portion of the community, *and those laws provide for a mode of contesting or contest-*

ing the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property as is appropriate to the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections."

"It is not possible to hold that where by the laws of the state the party aggrieved has, as regards the issues affecting his property, a fair trial in a court of justice, according to the modes of proceeding applicable to such case that he has been deprived of that property without due process of law."

In Mobile v. Kimball, 102 U. S. 691, L. Ed. 36, 238, the question arising was that the expense for improving Mobile harbor could not under the constitution then in force be imposed upon the county of Mobile alone; the work being for the benefit of the whole city.

The Court says:

"The objection to the act here raised is different from that taken in the state court. Here the objection urged is that it fastens upon one county the expense of an improvement for the benefit of the whole state. As-

may impose, there is a vast number of which, from their nature, no notice can be given to the tax-payer, nor would notice be of any possible advantage to him, such as poll taxes, license taxes (not dependent upon the extent of his business) and generally, specific taxes on things or persons or occupations. In such cases the legislature, in authorizing the tax, fixes its amount, and that is the end of the matter. If the tax be not paid, the property of the delinquent may be sold and he be thus deprived of his property. Yet there can be no question, that the proceeding is due process of law, as *there is no inquiry into the weight of evidence, or other element of a judicial nature*, and nothing could be changed by hearing the tax-payer. No right of his is, therefore, invaded. Thus, if the tax on animals be a fixed sum per head, or on articles a fixed sum per yard or bushel or gallon, there is nothing the owner can do which can affect the amount to be collected from him. So, if a person wishes a license to do business of a particular kind or at a particular place, such as keeping a hotel or restaurant, or selling liquors or cigars or clothes, he has only to pay the amount required by the law and go into the business. There is no need in such cases for notice or hearing. So, also, if taxes are imposed in the shape of licenses for privileges, such as those on foreign corporations for doing business in the

state, or on domestic corporations for franchise, if the parties desire the privilege, they have only to pay the amount required. In such cases there is no necessity for notice or hearing. The amount of the tax would not be changed by it.

But when a tax is levied on property, not specifically but according to its value, to be ascertained by assessors appointed for that purpose upon such evidence as they may obtain, a different principle comes in. *The officers, in estimating the value, act judicially*, and in most of the states provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law, to hear complaints respecting the justice of the assessments. The law in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."

"This decision covers the cases at bar. The assessment under consideration could, by the law of California, be enforced only by legal proceedings, *and in them any defense going either to its validity or amount could be pleaded.* In ordinary taxation, assessments, if not altered by a board of revision or of equalization, stand

good, and the tax levied may be collected by a sale of delinquent's property; but assessments in California, for the purpose of reclaiming overflowed and swamp lands, can be enforced only by suits and, of course, to their validity it is essential that notice be given to the tax-payer and opportunity to afforded him to be heard respecting the assessment. In them he may set forth, by way of defense, all his grievances."

This case only goes to the extent of holding that the legislature may provide *the manner* of raising means to pay for local improvements *and the district within which* such means shall be raised, and of determining what is due process of law. If special assessments must be levied in proportion to benefits, that is in proportion to enhanced value, this case is conclusive as to the nature of the authority which determines the amount of such benefits and that such determination is not a legislative function.

In Spencer v. Merchant, 125 U. S. 345, L. Ed. 31-763, the statute declared void in the case of Stewart v. Palmer, 74, N. Y. 183, provided that assessments should be levied "upon the lands and premises *which in the judgment of the board should be benefited by such improvements in proportion to the benefit accru-*

ing to them by reason thereof. The statute of 1881 under which the case arose, directed a levy to be placed upon the assessment rolls upon lands the assessments on which had been cancelled under the decisions of the court of appeals. "That the sum *be equitably apportioned* among the several parcels comprising said lands which should be sufficient to refund to the state of New York the sum its due by reason of the cancellation of the former assessments."

The statute further provided that before proceedings to collect said sum, the board "shall apportion the same among the several parcels of land hereinbefore mentioned and *said board shall give ten days' notice of the time and place when they will meet to make such apportionment; and all parties interested in said lands shall be entitled to be heard before said board upon the question of such apportionments.*"

This court says:

"Whether the estimate of the value of land for the purpose of taxation exceeds its true value, this court on writ of error to a state court cannot inquire."

"The legislature, in the exercise of its power, of taxation, has the right to direct *the whole or a part of the expense of a public improvement* such as the laying out, grading or repairing of a street, *to be assessed upon the owners of lands benefited thereby;* and the

determination of the *territorial district which should be taxed* for a local improvement is within the province of legislative discretion. *If the legislature provides* for notice to and hearing of each proprietor, at some stage of the proceedings, *upon the question what proportion of the tax shall be assessed upon his land*, there is no taking of his property without due process of law."

"In the absence of any more specific constitutional restriction than the general prohibition against taking property without due process of law, the legislature of the state, having the power to fix the sum necessary to be levied for the expense of a public improvement, and to order it to be assessed, either like other taxes, upon property, generally, or only upon the lands benefited by the improvement, is authorized to determine both *the amount of the whole tax*, and the *CLASS* of lands which will receive the benefit and should therefore bear the burden, although it may if it sees fit, commit the ascertainment of either or both of these facts to the judgment of commissioners.

"When the determination of the lands to be benefited is entrusted to commissioners, the owners may be entitled to notice and hearing upon the question whether *their* lands are benefited and how much. But the legislature has the power to determine, by the statute imposing the tax, *what lands*, which might be benefited

by the improvement, *are in fact benefited;* and if it does so, its determination is conclusive upon the owners and the courts, and the owners have no right to be heard upon the question whether their lands are benefited or not, but only upon the validity of the assessment, *and its apportionment among the different parcels of the class* which the legislature has conclusively determined to be benefited."

It is not certain from the opinion in this case that the court intended to say that the legislature may determine the amount that each parcel of land is benefited by the improvement or whether benefited at all. It did not so state in terms, and the inference from the context is that when the court says the legislature has the power to determine "what lands" are benefited, it in fact means "what class of lands." The court seems to have been very careful not to add to the legitimate power of the legislature by a holding that it has the power to determine what particular parcels of land are benefited and how much benefit *each parcel* receives. It is evident from the whole opinion that the power attributed to the legislature is the determination generally of what *class of lands* or what district is benefited generally by the improvement. This power is clearly legislative and legitimate. The decision, however, is based

on the question of opportunity of the property owner to be heard.

Our interpretation of the opinion in Spencer v. Merchant is strengthened by the consideration that to interpret the opinion that the legislature might determine the fact and amount of benefit to each parcel of property would be to repudiate the holding of the New York court of appeals in reference to the same assessments. That court following the principles enunciated in the leading case of People v. Mayor 4 N. Y. 420, says:

In Stuart v. Palmer, 74 N. Y. 183, the court says: "The commissioners were to ascertain *what land within the district of assessment was benefited*, and *then to apportion and assess the said sum upon such land, in proportion to benefits.* The assessment when made was declared to be a lien upon the land, and its payment could be enforced by a sale thereof."

"I am of the opinion that the constitution sanctions no law imposing such an assessment, without a notice to, and a hearing, or an opportunity of a hearing by the owners of the property to be assessed. It is not enough that the owners may by chance have notice, or that they may as a matter of favor have a hearing.

The law must require notice to them, and give them *the right to a hearing and an opportunity to be heard. It matters not, upon the question of the constitutionality of such a law, that the assessment has, in fact, been fairly apportioned. The constitutional validity of a law is to be tested, not by what has been done under it, but by what may, by its authority be done.* The legislature may prescribe the kind of notice and the mode in which it shall be given, *but it cannot dispense with all notice.*"

"Assessments for local improvements *can be justified only upon the theory that the lands upon which they are laid are specially benefited by the improvements for which they are laid and hence ought to bear the burden rather than property generally; and if a law should authorize such assessments to be laid, without reference to benefits, it would either take property for the public good, without compensation, or it would take property from one person for the direct benefit of another; and in either aspect it would be unconstitutional.* (Kerby v. Shaw, 19 Penn., 258; Schenley v. Commonwealth, 36 id., 29; McGonigle v. Alleghany City, 44 id., 118; In the matter of Washington Avenue, 69 id., 360; Patterson v. Society, etc., 24 N. J., 385; Tide-Water Co. v. Coster, 18 N. J. Eq., 519; In the matter of the Drainage of Lands, 35 N. J., 497; St.

John v. East St. Louis, 50 Ill., 92; Lee v. Ruggles, 62 id., 427; In the matter of Albany Street, 11 Wend., 149; Litchfield v. Vernon, 41 N. Y., 123)."

Walston v. Nevin, 128 U. S. 578; L. Ed. 32-544, came up on motion to affirm and the questions at issue in the case at bar do not seem to have been raised or much discussed. The statute provided with reference to the matter of hearing "that the general council or the courts in which the suits may be pending *shall make all corrections, rules and orders to do justice to all parties concerned.*"

The court says, quoting from Davidson v. New Orleans: "It is not possible to hold that a party has, without due process of law, been deprived of his property, when, as regards the issues affecting it, he has, by the laws of the state, a fair trial in a court of justice, according to the modes of proceeding applicable to such a case. And the conclusion was reached that neither the corporate agency by which the work is done, the excessive price which the statute allows therefor, nor the relative importance of the work to the value of the land assessed, nor the fact that the assessment is made before the work is done, nor that the assessment is unequal as regards the benefits conferred, nor that

personal judgments are rendered for the amount assessed, are matters in which the state authorities are controlled by the Federal Constitution. So the *determination of the taxing district* and the *manner of the apportionment* are all within the legislative power. And whenever the law operates alike on all persons and property, similarly situated, equal protection cannot be said to be denied."

In Palmer v. McMahon, 133 U. S. 660; L. Ed. 32: 772, the court, speaking of the power of taxation, says: "The power to tax belongs exclusively to the legislative branch of the government, and when the law provides for a mode of confirming or contesting the charge imposed, with such notice to the person as is appropriate t the nature of the case, the assessment cannot be said to deprive the owner of his property without due process of law. The *imposition of taxes* is in its nature administrative and not judicial, *but assessors exercise quasi-judicial powers in arriving at the value, and opportunity to be heard should be and is given under all just systems of taxation according to value.*"

"It is enough, however, if the law provides for a board of revision authorized to hear complaints respecting the justice of the assessment, and prescribes the

time during which and the place where such complaints may be made."

In Shoemaker v. United States, 147, U. S. 282; L. Ed. 37-170, it was made the duty of the commission appointed to levy a special assessment "to assess the same upon the lands, lots and blocks situated in said districts *specially benefited* by reason of the location and improvement of said park *in proportion to such benefits of said property;* and if the commission shall find that the benefits are not equal, the costs and expenses of the land obtained for the park, *they shall assess each tract especially benefited to the extent of the benefit thereto.*"

And it furthr provides that the commission should *give due notice of the time and place of their meeting for the purpose of making such assessments for benefits, and all persons interested might appear and be heard.*

The provisions under which assessments in this case are levied are in strict accordance with the rule laid down in Norwood v. Baker.

In Fallbrook Irrigation District v. Bradley, 164, U. S. 112; L. Ed. 41-369, the statute provided for a

tax within irrigation district *according to the value of the property*, for payment of the improvement; and provided *for a board of equalization and notice of its date of meeting "to equalize assessments."* The only question in the case was whether improvements of this character could be paid for *by general taxes* levied *according to the value* of all real property within the district.

The court says:

"Due process of law is not violated, and the equal protection of the laws is given when the ordinary course is pursued in such proceedings for the assessment and collection of taxes that has been customarily followed in the state *and where the party who may subsequently be charged in his property has had a hearing or an opportunity for one provided by the* statute."

"Although there is a marked distinction between a general tax and a special assessment, yet the former is still the exercise of an assessment for a local improvement and the levy of same power as the latter, both having their source in the sovereign power of taxation. Whatever objections may be urged to this kind of an assessment as being in violation of the state constitution, yet, as the state court has held them to be without force, we follow its judg

ment in that case, and our attention must be directed to the question whether any violation of the Federal Constitution is shown in such an assessment. Can an ad valorum assessment on the land benefited, or, in other words, can such an assessment as is provided for in sections 18, 20, 21 and 22 of the act, be legally levied in such a case as this? Assume that the only theory of these assessments for local improvements upon which they can stand is that they are imposed on account of the benefits received, and that no land ought in justice to be assessed for a greater sum than the benefits received by it, yet it is plain that the fact of the amount of benefits is not susceptible of that accurate determination which appertains to a demonstration in geometry. Some means of arriving at this amount must be used, and the same method may be more or less accurate in different cases involving different facts. Some choice is to be made, and where the fact of some benefit accruing to all the lands has been legally found, can it be that the adoption of an ad valorem method of assessing the lands is to be held a violation of the Federal Constitution? It seems to us clearly not."

This case presented an instance of local taxation that is *general taxation within a certain district*, confined to real property, for a local improvement. There does not appear to have been any provision in the state

constitution requiring uniformity of this class of taxation on all property, real and personal, and the case comes clearly within the established rule that "the legislature may, if not restrained by the state constitution, determine the amount to be raised, the district within which it shall be raised, and *the manner* in which it shall be *distributed* over the district. The legislature had determined *not* that any particular parcels of land would be benefited, but *that the district generally would receive benefit* and that it could be most equitably distributed by general taxation within the district according to value.

Review of cases cited in Brief of Defendant in Error:

In Bauman v. Ross, 167, U. S. 548, L. Ed. 270, the act of congress provided that the special assessments to pay for land condemned should be assessed one-half to the revenue of the District of Columbia and one-half against the property benefited in proportion to benefits received, and appointed a jury to apportion the assessments, and provided that the assessment should be confirmed by the court.

The court says: "The *class of lands* to be assessed for the purpose may be either determined by the legis-

lature itself, by defining a territorial district, or by other designation; *or it may be left by the legislature tot he determination of commissioners, and be made to consist of such lands, and such only, as the commissioners shall decide to be benefited.*"

"The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area or the market value of the lands, or in proportion to the benefits as estimated by commissioners."

"If the legislature, in taxing lands benefited by a highway, or other public improvement, makes provisions for notice, by publication or otherwise, to each owner of land, and for hearing him, at some stage of the proceedings, upon the question what proportion of the tax shall be assessed upon his land, his property is not taken without due process of law."

The question involved was only as to the *validity of the assessment of one-half the cost on property specially benefited "proportionally" according to benefits* received.

The decision of the court was that *this* was within the power of Congress under the Federal Constitution.

No decision of the validity or constitutionality of assessments *"in proportion to the position, the front-*

age, the area, or the market value of the lands" was necessary to the determination of the case, and the remarks of the court on that subject are *obiter.*

The case is not an authority in conflict with Norwood v. Baker.

In Wurtz v. Hoagland 114 U. S. 606 L. Ed. 229, the statute provided for the appointment of commissioners and directed the to assess then expense *as nearly as might be in proportion to benefits.* It provided for notice to property owners *and a hearing on the question of the justice of the assessment in court.*

The question decided was that proceedings under the act did not deprive the tax-payer of his property without due process of law. The case is in conformity with Norwood v. Baker.

The case of Shoemaker v. U. S. and McMillen v. Anderson have already been noticed.

From a review of the cases decided by this court we find that it has held that the legislature may determine the amount to be raised by special assessment, the district in which it shall be raised, whether it shall be raised by general taxation or special assessment, and if

by special assessment, the *class of lands* benefited, and the method of apportionment, and that these were legislative functions.

We find further that it has *never* held *that special assessments were authorized or could be imposed in any other manner, than upon the land benefited by the improvement, and according to such benefit; it has never held that the determination of the specific parcels of real property specially benefited, or the amount to which each parcel was specially benefited, was a legislative function, or a determination which the legislature had power to make.*

The inference from all the cases decided in this court, and from the fact it is uniformly held that upon such a determination the property owner has a constitutional right to be heard is that the power is judicial in its nature.

American legislatures are uniformly restricted by constitutional provisions to the exercise of purely legislative powers, and this is recognized in all decisions of this and all other American courts.

The decision in Norwood vs. Baker is no departure from the former decisions of this court.

SETH NEWMAN,
BURLEIGH F. SPALDING,
Counsel for Plaintiff in Error.

ERRATA.

In the original brief of plaintiff in error the following errors occur:

Page 26—Insert quotation marks after the words "municipal corporations" sixth line, the quotation extending continuously from page 22.

Page 31—Add "802a" to last line.

Page 39—Insert quotation marks after "States," third line from the top.

Page 40—The quotation from "7th N. D." extends continuously to the words "cases following Norwood v. Baker" on page 41, and there should be qutation marks after the word "heard" near the bottom of page 41.

No. 378.

Brief of Pinney for D. C.

Office Supreme Court U.S.
FILED
FEB 23 1901
JAMES H. McKENNEY,
Clerk.

(11,863)

BRIEF OF DEFENDANTS IN ERROR.

Filed Feb. 23, 1901.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1900.

NO. 378.

MORTIMER WEBSTER, *Plaintiff in Error.*

vs.

THE CITY OF FARGO; JAMES M. ROWE AS AUDITOR OF THE CITY OF FARGO; D. C. ROSS AS COUNTY TREASURER OF CASS COUNTY, AND O. J. OLSON AS COUNTY AUDITOR OF CASS COUNTY, *Defendants in Error.*

ON WRIT OF ERROR TO THE SUPREME COURT OF NORTH DAKOTA.

S. B. PINNEY,
JOHN E. GREENE,
H. F. MILLER,
Counsel for Defendants in Error.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1900.

NO. 378.

Mortimer Webster, Plaintiff in Error,

vs.

The City of Fargo; James M. Rowe as Auditor of the City of Fargo; D. C. Ross as County Treasurer of Cass County, and O. J. Olson as County Auditor of Cass County, Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR.

STATEMENT.

As supplementary to the statement made by counsel for the plaintiff in error, we call attention to the fact that it is not alleged in the complaint herein (Transcript pp. 4-8) that the property of the plaintiff was not benefited by the improvement to the full extent of the assessment; nor does it appear that either the plaintiff or any of the owners of property assessed for the improvement ever protested or made objection to either the improvement or the assessment.

ARGUMENT.

The principle underlying the right to make special assessments to cover the whole or a part of the cost of a local improvement, is, we believe, sufficiently understood to permit us to pass at once to the point in this case, without reviewing the history of legislation and adjudication which has brought the law on that subject up to its present state.

All taxation is the taking up of private property for public purposes, and is based upon the theory that the citizen derives a benefit from it, as much as upon the public necessity for it. Special taxation, or these local assessments, are based upon the necessity for some local improvement, and the benefit to result therefrom to the property in its immediate vicinity.

Those provisions of the Codes of North Dakota, under which was made the assessment complained of by the plaintiff in error, it is now claimed by him are in violation of the 14th amendment of the federal constitution, for that they authorize the taking of his property without due process of law.

The objectionable sections are 2279 and 2280 of the Revised Codes of 1895. And they are as follows:

Sec. 2279. When the city council shall deem it necessary to open, widen, extend, grade, pave, macadamize, bridge, curb, drain, or otherwise improve any street, alley, avenue, lane or highway, or other public grounds within the city limits or extend or improve any public system of

water-works exclusively owned and operated by the city for which a special assessment is to be levied, as herein provided, the city council shall, by resolution, declare such work or improvement necessary to be done, and such resolution shall be published for four consecutive weeks, at least once a week in the official newspaper of the city, and if a majority of the owners of the property liable to be assessed therefor, shall not within twenty days after the expiration of such publication file with the city auditor a written protest against such improvement, then the city council shall have power to cause such improvement to be made and to contract therefor, and to levy and collect the assessment as hereinafter provided, and all work done under this section shall be let by contract to the lowest responsible bidder therefor.

Sec. 2280. Whenever any work or improvement mention in the preceding section shall have been determined upon and the contract let therefor, the city engineer shall forthwith calculate the amount to be assessed for such improvement for each lot or parcel of ground abutting or bounding upon such improvement. And in estimating the assessment he shall take the entire cost of such improvement and divide the same by the number of feet fronting or abutting upon the same, and the quotient shall be the sum to be assessed per front foot so bounding or abutting, and said estimate shall be filed with the city auditor and shall be presented to the city council for its approval at the first meeting held thereafter. The city auditor shall cause said estimate of the city engineer, together with a notice of the time and place when the council will meet to approve of the same, to be published in the official newspaper of the city for at least ten days prior to the meeting of the city council to approve the same.

In order to determine whether or not this law is unconstitutional, we must agree upon the rule by which we are to be governed in the investigation. What is "due

process of law?" The definitions of these terms are almost as numerous as the classes of proceedings whereby the rights of persons and property are affected. A very comprehensive definition is given by Judge Cooley in his work on Constitutional Limitations (4th Ed. p. 441) as follows: "Due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

The case of *Wurtz* vs. *Hoagland*, 114 U. S. 606, it was held that the plaintiff in error had not been deprived of his property without due process of law when his property had been assessed for a local improvement under a statute of New Jersey which provided in substance as follows: The Board of Managers of the Geological Survey, on the application of at least five owners of separate lots of land, included in any tract of land subject to overflow from freshets, or which was usually in low, marshy, boggy or wet condition, were authorized to examine the tract, and if they deemed it for the interest of the owners they were to make surveys, and decide upon a system of drainage, and report it to the supreme court of the state; thereupon the court upon reasonable notice published in a newspaper in the county, was directed to appoint three commissioners to superintend and carry out such system of drainage, but

if, at the time fixed for such appointment, it should appear to the court by a written remonstrance by the owners of a majority of such low and wet land, that they were opposed to the drainage at the common expense, then no commissioners should be appointed. The law also provided that, if commissioners were appointed, and made an assessment upon the lands included in such tract, notice should be given of the time and place when and where the court would hear and pass upon any objections made by the persons interested.

In *McMillen* vs. *Anderson*, 95 U. S. 37, it was held that the constitutional provision that no state shall deprive any person of life, liberty or property without due process of law, does not require that persons taxed by the law of the state shall be present or have an opportunity to be present when the tax is assessed against them. And it was further held that a statute which gives the taxpayer a right to enjoin its collection, and have the validity of the tax decided by a court of justice, is due process of law notwithstanding it requires the party to give security in advance as in other injunction cases. We call attention to the very interesting comments upon this subject in *Weimer* vs. *Bunburg*, 30 Mich. 201, 212.

DARK PAGE BLEED THRU

Before proceeding to analyze the statute in question here in the light of the foregoing citations, it is necessary that we consider another most vital question, viz.:

Has the legislature the power to prescribe the method of apportioning special assessments of the kind involved in this case?

An examination of the authorities forces us to the conclusion that this question must be answered in the affirmative.

In *The Providence Bank* vs. *Billings*, 4 Peters, 514, Chief Justice Marshall makes use of language, at page 563, which is of interest as introductory to this branch of the discussion: "The power of legislation, and consequently of taxation, operates on all the persons and property belonging to the body politic. * * * * However absolute the right of an individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the legislature. This vital power may be abused; but the Constitution of the United States was not intended to furnish a corrective for every abuse of power which may be committed by the state government. The interest, wisdom and justice of the representative body, and its relation to its constituents, furnish the only security * * * * against unwise and excessive taxation, as well as against unwise legislation generally." This language has reference more particularly to general taxation, but it is an eloquent

reminder that the constitution is not intended as a refuge for, and that it will not afford relief to every victim of unwise legislation.

We contend that section 2280 of the North Dakota Codes, which prescribes the method of apportionment in all cases of street improvements in cities within the state, is a result of the proper exercise of legislative discretion upon a matter of policy. Such legislation has been approved by the highest authority.

Bauman vs. Ross, 167 U. S. 548.
Shoemaker vs. United States, 147 U. S. 282.
Sheley vs. Detroit, 45 Mich. 432.
Cleveland vs. Tripp, 13 R. I. 50.
State vs. Fuller, 34 N. J. (law) 227.
2 Dillon Mun. Cor. Sec. 752.
Cooley on Taxation, p. 661. (2nd Ed.)
Cooley Cons. Limitations 631, 632.
Northern Ind. R. R. Co. vs. Connelley, 10 Ohio, (N. S.) 159, 165.

In *Bauman* vs. *Ross*, above cited, this court said: "The rule of apportionment among the parcels of land benefited also rests within the discretion of the legislature, and may be directed to be in proportion to the position, the frontage, the area, or the market value of the lands, or in proportion to the benefits as estimated by commissioners."

In *Cleveland* vs. *Tripp*, above cited, the chief justice of the Rhode Island court says: "To entitle us to hold that the statute authorizing these assessments is uncon-

stitutional we ought to be satisfied, not only that fairer modes of assessment might be devised, but that the prescribed mode is indefensibly unfair; for in a matter of legislative policy, it will not do for the court to substitute their own judgment for that of the General Assembly and to convict the General Assembly of fatal error, simply because they differ from it in opinion."

Judge Cooley in his work on taxation, as above cited, says: "It is conceded that the legislative judgment, that a certain district is or will be so far specially benefited by an improvement as to justify a special assessment, is conclusive, and that its determination as to what shall be the basis of the assessment is equally conclusive. To invoke the intervention of a court for relief against the results of its conclusions is to invoke the judicial authority to give its judgment controlling effect over that of the legislature, in a matter of the apportionment of a tax, which by concession on all sides is purely a matter of legislation."

It will not do to argue, in the face of these authorities, that the apportionment of a special assessment is a judicial act, and in the case at bar, that the legislature of North Dakota has invaded the province of the judiciary.

Article 6 of the constitution of North Dakota provides that "the legislative assembly shall provide by general law for the organization of municipal corporations, restricting their powers as to levying taxes and assessments."

The legislature, by the statute in question, have done

no more than obey the mandate of the constitution. It was clearly within the means of that representative body to ascertain what rule of apportionment of such assessments within the cities of the state, would come nearest to justice and equality, and we must presume that, when they made section 2280 a part of the general charter for all cities, they did so upon full investigation, and with the design to subserve the best interest of those who might be affected by such assessments.

But it is argued that the law utterly ignores the matter of benefits. If the question of benefits is to govern, we have but to turn again to the authorities for the interpretation of these statutory apportionments. When the legislature directs that the cost of the improvement be assessed to the abutting property, by whatever rule, it will be presumed that they have determined that the cost will not exceed the benefits.

Petition of Roberts, 81 N. Y. p. 62.
Northern Indiana R. R. Co. vs. Connelly, *supra*.
Cooley on Taxation (2nd Ed.) p. 646.
State vs. Fuller, supra.
Schenley vs. Commonwealth, 36 Pa. St. 29, 57.

In Cooley on Taxation, as above cited, we find the rule best stated as follows: "Apportioning the cost by the frontage on the improvement is adopted by the legislature as constituting, in the judgment of its members, an ap-

portionment in proportion to benefits as nearly as is reasonably practicable."

See also the dissenting opinion of Mr. Justice Brewer, in *Norwood* vs. *Baker,* 172 U. S. at page 299.

So far we have eminent authority supporting the proposition that, within certain bounds, legislative apportionment of local assessments is, a proper exercise of legislative power; and further, that when the legislature establishes the rule, it is presumed to have determined that the benefits will equal the cost of the improvement.

We shall now inquire into the procedure in the case at bar, to ascertain whether or not such notice has been given as to afford the plaintiff in error a sufficient opportunity to be heard.

On March 4th, 1896, the city council of the City of Fargo, acting under section 2279, passed a resolution declaring it necessary to grade and pave the street opposite the property of the plaintiff in error, which resolution was published in the official newspaper of the city, for the period required by said section. (Transcript p. 5, Paragraph V. of complaint.) On June 22nd, 1896, and 25 days after completion of the publication of the said resolution, said city council, by another resolution, directed the improvement to be made, and directed the city auditor to

advertise for bids. (Id. Paragraph VII. of complaint.) By paragraph XVI. of the complaint, (Trans. p. 8) it is alleged that all acts and proceedings required by the statute in such cases, were taken and done, so this last action of the council pre-supposes that no protest against the improvement were presented, such as contemplated by section 2279. By this first resolution notice was given that, in the absence of the protest by the property owners, the improvement would be made, and if made, that the cost would be apportioned in the manner prescribed by section 2280, of which all persons were bound to take notice. If the majority of the owners of the property to be affected were opposed to the improvement on that basis of assessment or otherwise, they had but to file their protests within the 20 days following the last publication of the resolution—May 28th, 1896; if the protests had been so filed, no further action on the part of the council could be taken. No protests having been filed, the city council on June 22nd passed the second resolution, and the auditor caused to be published an advertisement for bids for the work of so improving said street, which bids were to be filed on or before the 6th day of July, 1896. On the 24th day of June the bid, which was finally accepted, was filed. (Trans. p. 6. Paragraphs VII. to IX. of the complaint.) Thereupon the city engineer of said city proceeded to calculate the amount to be assessed upon each lot or parcel of ground abutting on such improvement, in the maner prescribed by

section 2280, and such estimate of the assessment was duly published with a notice that the council would meet on September 28th, 1896, at 7:30 o'clock p. m., to approve such assessment. (Trans. pp. 6, 7. Paragraph X. of complaint.) On September 28th the council met pursuant to such notice, and by resolution said estimate was approved, and thereupon the auditor duly prepared the formal assessment, which was also duly published. (Trans. p. 7. Par. XI. of complaint.)

By these proceedings, (all within the purview of the charter provisions) the persons interested were given three opportunities to be heard before the assessment became a lien upon their property. First: When the resolution declaring the improvement necessary was published, they were notified that if the work was done it would be apportioned according to the rule fixed by section 2280, and they had from the 7th day of March, 1896, to the 22nd day of June following in which by protest to absolutely annul all proceedings looking to such an assessment. Second: When the council met, pursuant to published notice, on July 6th to consider the bids which, if accepted would determine the cost of the work, they had an opportunity to be heard, and if the probable expense was too great they could then petition their local representatives—the city council—to stop further proceedings. Third: When the council met to approve the engineer's estimate on September 28th, 1896, they had a final opportunity to inspect the proposed assess-

ment and see that they were not disproportionately assessed.

If the legislature has the power to fix the method of apportionment, what more can be asked by way of notice and hearing than has been thus afforded under section 2280? What "safeguards for the protection of individual rights" have been ignored? What "settled maxims of law" in relation to taxation and assessment have been transgressed? If the legislature may fix the mode of apportionment by general law, then notice of the law is sufficient notice on that point, and our procedure is similar to that involved in Wurtz vs. Hoagland, before cited, whereby a majority of the property owners may, by timely protest nullify the whole proceeding. From what has already been shown from the authorities, and the application of the rules set forth, to the statute here involved, and what has been done under it, we conclude that the law is not in violation of the 14th amendment of the federal constitution; and further that the statute is in no way condemned by the decision in *Norwood* vs. *Baker*, 172 U. S. 269.

In *Norwood* vs. *Baker*, above cited, the court had under consideration an ordinance of the Village of Norwood, whereby the village council sought to open a street, ostensibly under authority of the law of the state but in fact without color of law or justice. It will be remembered that

the state legislature had not in that instance fixed upon any one method of apportionment, but it was left to the village authorities to apportion the burden "*either* in proportion to the benefits which may result from the improvement *or* according to the value of the property assessed, or by the front foot of the property bounding and abutting upon the improvement, as the council by ordinance, * * * * may determine." The statute seems to be silent as to the matter of notice of any proceedings. Furthermore the language of the statute is such as to imply that if assessment was levied upon the basis of valuation of the property, or under the "front foot" rule, the matter of benefits was to be excluded. The council evidently so regarded it. The ordinance is remarkable, judging of it from the statement given in the Norwood-Baker case on pages 274 and 275 of the report. It declared the intention of the village to condemn and appropriate the lands in question, and did so condemn and appropriate them; it provided that the cost of the condemnation proceedings together with compensation paid for the land condemned and interest upon bonds, if any, be assessed *per front foot* upon the abounding property. The abounding property was all owned by the person whose property was condemned and appropriated by the village. The assessment was made pursuant to that ordinance. There appears nowhere in the ordinance, nor by any other proceedings had, that any estimate of the cost, or of the proposed assessment was made and filed,

as required by section 2277 of the Revised Statutes of Ohio, or otherwise; or that any time or place was fixed or allowed when or where the person interested should be heard upon the question of the assessment, or apportionment thereof. If there had been embodied in the ordinance a provision like the one contained in section 2279 of the North Dakota Codes, the protest of the appellee, Baker, in that case would have protected her against any such high-handed proceeding. In that case the statute of the state seems, by its terms to license the disregard of the matter of benefits, and the village council seem to have used that license to the utmost, with the result that the property of Baker was practically confiscated.

We submit that the cases are in no sense parallel, and that *Norwood* vs. *Baker* is not opposed to the contention of the defendants in error here.

We most respectfully ask that the judgment of the state court be affirmed.

S. B. PINNEY,

Counsel for Defendants in Error.

JOHN E. GREENE,

H. F. MILLER,

Associate Counsel.

Supreme Court of the United States.

No. 378.—October Term, 1900.

Mortimer Webster, Plaintiff in Error, vs. The City of Fargo and others. } In error to the Supreme Court of the State of North Dakota.

[April 29, 1901.]

This was an action brought by Mortimer Webster in the district court in and for the county of Cass and State of North Dakota, against the city of Fargo; James M. Fargo, as auditor of said city; D. C. Ross, as treasurer, and G. J. Olson, as auditor, of Cass County, in which the plaintiff sought to enjoin the defendant from enforcing an assessment for grading and paving against certain lots or pieces of land belonging to the plaintiff, and abutting on the streets of the city of Fargo.

It was admitted, and, indeed, alleged, in the complaint, that "each and every of the acts and proceedings required to be done and taken by the statutes of said State of North Dakota in making and return of said assessment, as aforesaid, were duly taken and done," but it was alleged that the State statutes, under which the work was done and the assessment made, were in violation of the Fourteenth Amendment of the Constitution of the United States, in that they prescribed for paying for grading and paving the streets, by an assessment upon abutting lots by the foot-front rule.

The defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer, and, as the plaintiff declined to amend, entered a judgment dismissing the complaint. From this judgment an appeal was taken to the Supreme Court of the State of North Dakota, which court affirmed the judgment of the district court dismissing the complaint. A writ of error from this court was thereupon allowed by the Chief Justice of the Supreme Court of the State of North Dakota.

Mr. Justice Shiras delivered the opinion of the Court.

It is conceded, in this record, that the plaintiff in error has no ground to complain of any discrimination attempted against him, either in the statutes of the State or in the proceedings thereunder, whereby the tax in question was assessed against his property. The sole contention on his behalf is that, under the decision of this court in the case of *Norwood* v. *Baker*, (172 U. S. 269,) all special assessments upon the basis of frontage

are in violation of the Fourteenth Amendment to the Constitution of the United States, in that they may result in the taking of property without due process of law.

But we agree with the Supreme Court of North Dakota in holding that it is within the power of the legislature of the State to create special taxing districts, and to charge the cost of a local improvement, in whole or in part, upon the property in said district, either according to valuation, or superficial area, or frontage, and that it was not the intention of this court, in *Norwood* v. *Baker*, to hold otherwise.

It is unnecessary to enter upon an examination of the authorities, as that has recently been done in the case of *French* v. *Barber Asphalt Company*, (181 U. S. ——;) and, upon the authority of that case, the judgment of the Supreme Court of North Dakota is

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.